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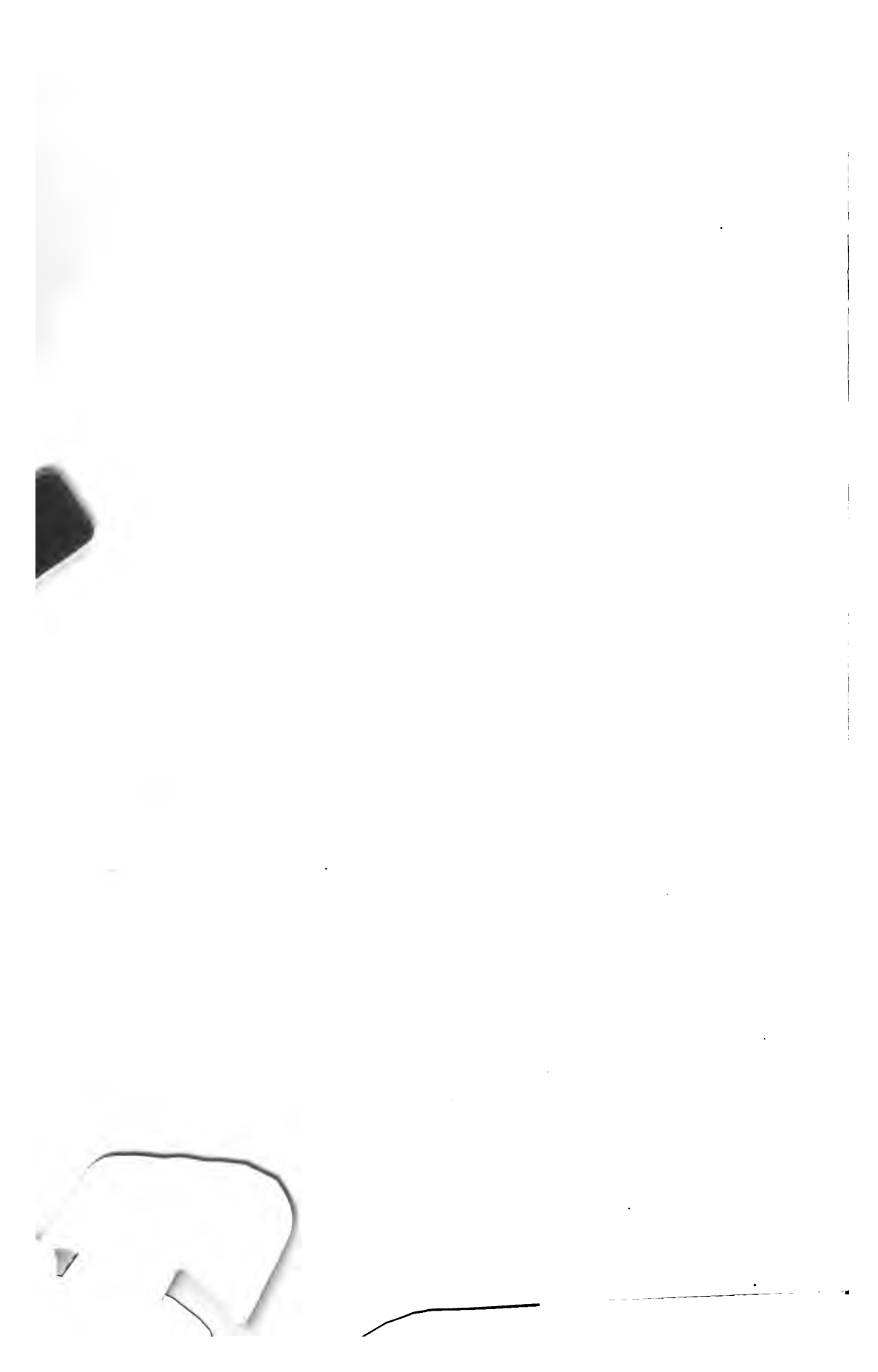
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THE
PRACTICE AT LAW,
IN EQUITY,
AND IN
SPECIAL PROCEEDINGS,
IN ALL
THE COURTS OF RECORD IN THE STATE OF
NEW YORK;

WITH APPROPRIATE FORMS.

By WILLIAM WAIT,
COUNSELLOR AT LAW.

VOLUME I.

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PREFACE.

WHEN a new work is offered to the public, and, especially, when there are several existing works upon the subject, it is expected that the author will state the reasons which induced the publication, and that he will give an outline of its plan and character.

In the first place, then, it is an admitted fact that an extensive, accurate and convenient work upon the practice in the courts of record of this State, is one that is greatly desired by the profession.

Several works have been written, and each of them has its merits; but no one of them has professed to include the entire practice at law, in equity, and in special proceedings, in all the courts of record in this State.

It is true that there are numerous works, English and American, which, in the aggregate, treat of the subjects included in this work; but most of them cover the same ground that the others do, so that they are practically duplicates. Again, most of them omit, altogether, some of the most important subjects; and they are all of them several years behind the statutes and the decisions of the courts.

There is still another feature of these works which deserves notice. In some of them the Code seems to be regarded as the entire system of practice, and their efforts seem to have been limited to an exposition of its provisions. This view is proper enough in one aspect, but it is, nevertheless, a very limited view of a full system of practice.

It is to be recollected that the American practice had its origin in the English courts, and that the practice of the courts of Queen's Bench, the Common Pleas and the Exchequer, furnished many of those rules of practice which so long governed the practice in our courts.

In this State, as in other States of the Union, statutes have been passed, from time to time, for the purpose of changing or settling the

rules of practice, and the New York Code is a striking and extensive illustration of such legislation. But it is believed that a very erroneous impression exists in the minds of some persons, with regard to the Code, both as to its object and as to what it has affected. It was not designed nor enacted as a complete system of practice, for it expressly authorizes a resort to the former practice whenever its own provisions fail to meet the wants of a given case.

Again, the Code itself is but a statutory declaration of principles and rules, which were long ago settled and acted upon by the courts; and, in the preparation and execution of the plan of this work, the Code has been regarded like any other statute, controlling where its terms are mandatory and express; but, beyond this, leaving the old statutes and decisions to settle what is the present practice.

No work on practice can be complete unless it furnishes the entire practice as it now exists, whether its rules are given by statute, or are founded upon the decisions of the courts, whenever they may have been decided.

Such a work on practice combines all the advantages of the statutory changes, while it retains the accumulated learning of the wisest and best judges of the past.

While thus retaining the valuable rules of the past, which are now in force, there is much of the old practice which has become obsolete, and it is, consequently, omitted.

In selecting the materials for this work, the object has been to include all the statutes and decisions now in force, and to incorporate them into one uniform system of practice which shall cover the proceedings at law, in equity, or in special proceedings.

In attempting the preparation of a work so extensive, the writer will find difficulties upon all sides. He will not lack materials, for the books are filled with them; but it is not possible, nor is it desirable, to give all the decisions that are now sound law.

The only practicable mode of securing the advantages furnished by the authorities, is, to state clearly, fully and yet concisely, as many rules of practice as possible, and to fortify them by a reference to a sufficient number of late controlling decisions, or to refer to some statute which gives or declares the rule.

PREFACE.

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The adoption of the Code necessarily resulted in unsettling the practice, and the numerous conflicting decisions as to the construction of that act, were unavoidable under the circumstances. But, after more than twenty years' experience, it may be said that the general practice is very well settled.

Of course there are, and there will continue to be, disputed and doubtful questions arising for decision by the courts. Yet the great important principles are so well settled that the practitioner will seldom feel at a loss as to the course to be pursued.

To examine all the statutes as well as all the authorities, English and American, and to select such of them as shall be of value in the construction of a work on practice, is one of the most laborious and difficult of tasks. To avoid all errors in selection, and to prevent any omissions of valuable matter, is not the lot of any author.

In some cases of conflict in the authorities, it is very difficult to determine what the true rule is, and, in such cases, that rule has been adopted which seemed best sustained by authority, as well as in harmony with the entire system of practice laid down in this work.

It is the author's view that what is most needed in a practice is a uniform, complete and accurate work. It is important that there should be a settled system; and, even if some of the rules adopted may seem doubtful, yet if an entire harmonious, practicable and reliable system is laid down, it is as much as can reasonably be hoped for.

One prominent change introduced by the Code was the adoption of a uniform mode of proceeding in all cases, whether legal or equitable, when this was practicable. Under the former systems, an action at law was not commenced in the same manner as a suit in equity, but, the Code provides that a summons shall now be the only mode of commencing either kind of action.

So, in many other matters, the practice is the same, or nearly so, whether the action be a legal or an equitable one. In all such instances, a single explanation serves for the entire work, and covers every case which falls within the rule laid down.

But there are some differences in the modes of procedure which cannot be reconciled, and there are some essential features that cannot be changed. An action at law, and a suit in equity, cannot possibly be

prosecuted in the same manner from the commencement to the termination of the action. Yet this is not a cause of confusion; for when the action is a legal one, the practice in legal actions is adopted so far as it differs from an equity suit; and, where the suit is an equitable one, the equity practice is to be pursued so far as may be necessary to attain the end in view. By thus securing the advantages of a uniform, general practice, so far as that is practicable, and then dividing and discussing each part of the practice by itself, all the advantages of a full examination, and of a convenient arrangement will be attained.

In those special proceedings which differ from the ordinary practice in actions, these peculiarities are pointed out and explained.

In every branch of the practice forms are required, and these have been inserted in the text in their appropriate places, and in such number and variety as will meet the wants of the practitioner.

A careful and methodical division, and a convenient arrangement of the various parts of a work on practice, are of the highest value. To secure the advantages of an extensive and a minute division of the entire subject, and to arrange in convenient order the separate portions of the work, it has been divided into parts, chapters, articles and sections, and by letters and figures when a further subdivision has been found convenient in some particular instance.

To aid in taking a comprehensive view of the entire work, a brief sketch of the several parts will be given.

Part 1, Actions. Treating of the nature of actions generally; of the distinction between legal actions and equitable suits; of the union of legal and equitable remedies; of the right of action; of the jurisdiction of actions; of the time of commencing actions; of remedies without actions; of the evidence to sustain them; of parties to actions; of the place or court in which to sue; of leave to sue or defend, and of submitting controversies without action.

Part 2, Courts and their Officers. Treating of courts in general; of courts of law; of courts of equity; of their organization, jurisdiction and powers; of the officers of the courts; of the United States Courts; of the Court of Appeals; of the Supreme Court; of the County Courts; and of all the other courts of record of this State.

Part 3, Practice considered generally. Treating of the subject in

general; its origin and history; of the practice at law prior to 1846; of the practice in equity prior to 1846; of the old practice, and how much of it has been retained; of the present practice, and upon what it is founded.

Part 4, Commencement of Actions. Treating of the summons, its requisites and forms; of its service and return; of the proof of service; of appearance; and of all the proceedings taken in the commencement of an action down to service of the pleadings.

Part 5, Provisional Remedies. Treating of 1, Arrest and Bail; 2, Replevin, or Claim and Delivery; 3, Injunction; 4, Attachment; 5, Receivers; 6, *Ne Exeat*. These subjects are all very fully discussed, and include all the forms required in actual practice.

Part 6, Pleadings. This is not a work in which the subject of pleadings is expected to be treated of with great fullness of detail, and yet the principal general rules of pleadings have been given, as well as those relating to complaints, answers, replies or demurrers. The practice in relation to pleading has been minutely explained in this part of the work.

Part 7, Proceedings between pleading and trial. These proceedings are very numerous and important, and they have been very fully and carefully detailed.

Part 8, Trials, and new trials. The entire subject of trials has been discussed in a most exhaustive manner, treating of trials by jury, by the courts and by referees. The subjects of interlocutory decrees, judgments and orders form a part of this branch of the work.

The mode of obtaining new trials, on motion or by appeal, including the entire practice which is to be followed, has been very fully presented.

The practice in relation to the trial of causes has been illustrated and fortified by very numerous and important cases, which meet nearly every question that arises upon the trial of a cause.

The preparation for trial, including the mode of procuring the attendance of witnesses, or of securing their evidence on commission, is very fully set forth, as well as the mode of procuring documentary evidence.

Part 9, Costs. The cases upon this subject are numerous, and they

have been carefully collected and arranged for examination. In no other work have the New York decisions been so fully and accurately given.

Part 10, Judgment. Treating of the nature of judgments and decrees in general; of judgments in legal actions; in equitable suits; in litigated actions; by default; by confession; on offer; on interlocutory orders or decrees; of the mode of entering; of amending or vacating them; of the lien of; satisfaction or discharge, and of their revival. The extent of this subject forbids more than a mere mention of some of the divisions of it. But it is intended that the practitioner and the student shall find here any information desired upon this branch of the practice.

Part 11, Enforcement of judgments, decrees or orders. As this is an extensive field, it will suffice to say that it treats of executions against the person, or personal or real property; of supplementary proceedings; of process of contempt; of the writ of assistance; of injunction; of sequestration; of receivers; of precepts for costs, etc., etc.

Part 12, Appeals. Treating of appeals in general; when an appeal lies, and when not; in favor of whom; of appeals to the court of appeals; to the general term of the Supreme Court; to the general term of other courts; of appeals from inferior courts to the Supreme Court, or other appropriate appellate court; and from inferior courts to the county courts, etc.

Part 13, Motions and orders. The need of full and accurate information upon this subject is familiar to every practitioner and student; and it is here supplied.

Part 14, Miscellaneous proceedings. In this part will be included those matters which cannot very well be limited to any one particular part of the work.

Part 15, Actions or proceedings relating to real estate. This part of the work is quite extensive, and includes a discussion of the practice as to actions of ejectment, for dower, partition, foreclosure, waste, nuisance, etc., etc.

Part 16, Actions and proceedings of a special nature, whether legal or equitable. This part treats of such proceedings as certiorari, whether

at common law or by statutes; habeas corpus; mandamus; prohibition *quo warranto*, and the like making more than twenty chapters.

Part 17, Actions and proceedings in particular characters, or by and against particular persons. Such as actions by and against corporations, joint-stock companies, public bodies, public officers, partners, husband and wife, infants, etc., etc., making some twenty chapters.

Part 18, Forms of practice. This part will include such practice forms as may be deemed useful, and such as are not inserted in the text of the work.

Part 19, Forms of pleadings. Including such forms as may be desirable in a work on practice, and such as have not been given in the previous parts of the work.

Part 20, Surrogate's practice. This part will give the full practice in these courts, but it does not discuss the law as to wills, executors, etc.

Part 21, The Code and the rules. In this part a complete Code, and a set of the Rules of the courts, will be given as they are in force, at the time of publication. From this brief sketch it will be easy to see what may be expected from this work.

And now a few words as to the citation of authorities and statutes. The court of appeals reports are cited by both the number of the New York series, and by the abbreviated name of the reporter. The Revised Statutes are cited from Edmond's second edition, and the original paging of the first edition. The Session Laws are cited by the year, chapter and section, and by a reference to them in Edmond's General Statutes. In preparing this work, most of the English works on practice have been consulted, as well as many of the American works upon the subject. In all of them there have been found valuable suggestions, and they have all been used as digests in referring to the decisions or the statutes. To mention those works which have been deemed most useful would seem like expressing an undue preference, or exhibiting some partiality, and for that reason no works however much esteemed will be mentioned by name.

In selecting the materials for this work, the reports and statutes have been mainly relied on. As the author's set of New York reports is so completely annotated that every case has a note referring to every sub-

sequent case in which it is mentioned in an opinion, the number of references will be seen to be almost unlimited. The invariable rule has been to state the rule from the latest and most authoritative decisions, and to cite just sufficient cases to establish the rule, leaving the reader to consult the digests or codes for a collection of all the authorities.

In selecting the forms of practice, those prepared by N. C. Moak, Esq., were examined, and some of them have been used. The legal learning and the accuracy of Mr. Moak adds to the reliability of these forms.

In preparing the text of the work, I have been assisted by some gentlemen of learning and industry, and I cannot let this occasion pass without mentioning their names. Mr. Edwin Baylies, Mr. C. Theodore Boone, and Mr. Clayton M. Parke, counselors at law, have materially aided in collecting and preparing the materials for the work.

The amount of labor bestowed upon the preparation of these volumes will not be appreciated by any one except those who have performed a similar task. But, if it shall prove a safe guide for the student, a ready hand-book for the profession, and a convenient and useful assistant to the judges, the author will have achieved all that he attempted.

Should any member of the bench or the bar discover omissions or inaccuracies in the work, a mention of the fact will be most welcome, and in a second edition will be carefully carried out, with all other possible improvements.

WILLIAM WAIT.

ALBANY, *June 30*, 1872.

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PART I.

ACTIONS.

IN WHICH ACTIONS ARE CONSIDERED GENERALLY,
AND IN THEIR RELATIONS TO REMEDIES, WHETHER
LEGAL OR EQUITABLE.

CHAPTER I.

THE NATURE OF ACTIONS.

ARTICLE I.

THE NECESSITY FOR ACTIONS AND THEIR ORIGIN.

Section 1. Laws; their nature and objects. In every condition of civilized society there must be some customs, rules, or principles, by which rights may be investigated, duties or liabilities declared, controversies determined, and remedies enforced.

Among the advantages to be derived from entering into society are those of protection of person, and the security of property; and, therefore, men have a right, and they are in some degree compelled, to apply to the public authorities for redress when rights are withheld, or injuries have been committed.

The natural right of individuals to redress wrongs, or to take the law into their own hands, cannot exist in a well-organized state of society, except in a few instances; and the general rule is, that all rights must be declared, and all remedies enforced by the proper tribunals in accordance with settled principles and the forms of law.

The elements or principles of a system of laws may be comparatively simple in form, and few in number, when considered with reference to their origin in an early stage of society; but, as the wants of society increase, the system will expand until it extends to and includes every case which, according to justice, and the public interest, requires consideration.

It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules, established by

positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it. These general principles of equity and policy are rendered precise, specific, and adapted to practical use, by usage, which is the proof of their general fitness and common convenience, but still more so by judicial exposition; so that, when, in a course of judicial proceeding, by tribunals of the highest authority, the general rule has been modified, limited and applied, according to particular cases, such judicial exposition, when well settled and acquiesced in, becomes itself a precedent, and forms a rule of law for future cases, under like circumstances.

The effect of this expansive and comprehensive character of the common law is, that while it has its foundations in the principles of equity, natural justice, and that general convenience which is public policy; although these general considerations would be too vague and uncertain for practical purposes, in the various and complicated cases, of daily occurrence, in the business of an active community; yet the rules of the common law, so far as cases have arisen, and practices actually grown up, are rendered, in a good degree, precise and certain, for practical purposes, by usage and judicial precedent. Another consequence of this expansive character of the common law is, that when new practices spring up, new combinations of facts arise, and cases are presented for which there is no precedent in judicial decision, they must be governed by the general principle, applicable to cases most nearly analogous, but modified and adapted to new circumstances, by considerations of fitness and propriety, of reason and justice, which grow out of those circumstances.

The consequence of this state of the law is, that, when a new practice or a new course of business arises, the rights and duties of parties are not without a law to govern them; the general considerations of reason, justice, and policy, which underlie the particular rules of the common law, will still apply, modified and adapted, by the same considerations, to the new circumstances. If these are such as give rise to controversy and litigation, they soon, like previous cases, come to be settled by judicial exposition,

and the principles thus settled soon come to have the effect of precise and practical rules. *Norway Plains Co. v. Boston and Maine Railroad*, 1 Gray, 263, 267, 268; *Bell v. The State*, 1 Swan. (Tenn.) 42.

With the advancing state of society, new questions are constantly arising for decision, and the courts adapt the practice and course of proceedings to the existing condition of things, instead of adhering to forms and rules which were established under different circumstances; and they do not decline the enforcement of rights or the administration of justice, because there is no remedy according to the old forms or rules. *Wallworth v. Holt*, 4 Mylne & Craig, 635.

The principle upon which the courts proceed is, that the common law does not mould the habits, the manners, and the transactions of mankind to inflexible rules, but adapts itself to the business and the circumstances of the times, and keeps pace with the improvements of the age. *Lyle v. Richards*, 9 Serg. & Rawle, 351.

Our system of common-law rules and of equitable principles consists of the accumulations of several centuries, as is entirely evident, when it is remembered that so much of our law is derived from that of England. So extensive, so complicated, so useful, and so practical a system could not be the work of one man, nor of one nation, nor even of one age. Its vast collection of adjudged cases is the growth of centuries; and, from a comparatively small number of decisions in the early times, the number has constantly increased, and the system of jurisprudence has expanded from time to time as the constantly recurring demands of men have presented questions to the tribunals for decision, until the result has been the establishment of a system of legal and equitable jurisprudence which is adequate to the demands or the necessities of a great commercial nation.

In the construction of this system the courts were constantly in the habit of applying to new combinations of circumstances those rules of law which were to be found in judicial precedents, or in works treating of legal principles; and, for the sake of attaining uniformity, consistency, and certainty, those rules or principles, unless clearly unreasonable, or inconsistent, were applied in all cases as they arose. But, notwithstanding the great number and variety of decisions, there always have been, and there are now, cases constantly occurring which are new in

Nature and definition of actions.

principle, or of first impression. So, too, there are cases which, though not new in principle, yet present questions which have never been determined. In all such cases, the courts avail themselves of the vast collections of principles which have been settled as law, and then from the analogies of the law, and the reason and justice of the case, they decide in such manner as will best subserve the rights of the parties, and the public interests, if such decision should be followed as a precedent.

In addition to the decisions of the courts, the legislature has enacted a vast system of statute law, in relation to rights and remedies. It is from this extensive system of legal and equitable jurisprudence, and from the various statutes of the State, that a knowledge of the practice of the courts is to be obtained. And while engaged in the study of that practice, it will be constantly borne in mind, that many of its rules are statutory enactments, instead of being principles established by the decisions of the courts. Yet, whenever the statute has not provided a rule, the courts are at liberty to resort to the decisions, for materials to supply the defect.

In the creation or establishment of laws, it is the province of the legislature to determine what is best for the public good, and to provide for it by proper enactments. The province of the judge is to expound the law, instead of making it. The written law he is to ascertain from the statutes; and the unwritten law he is to find in the decisions of his predecessors, and of the existing courts, or from the text-writers of acknowledged authority, and upon the principles which are clearly to be deduced from them by sound reason and just inference.

Section 2. Nature and definition of actions. Whenever a person believes that he is about to be injured by the act of another, or, when he feels that an injury has already been done, he will naturally adopt the most effective means of preventing or removing the injury, or of redressing the wrong committed; and on the other hand, the party against whom the claim is made will desire to know whether he can successfully resist the demand, and by what means; and, for these purposes, each party, whether complainant or defendant, must, with or without the aid of legal advisers, carefully consider the law affecting the asserted right, and the nature of the injury or offense, and the remedies or punishments, before any steps can properly be taken, whether precautionary, offensive or defensive, or the result may be a

serious error by which he may become a wrong-doer, or may lose all means of redress, or may waive a good defense in consequence of his injudicious proceedings or omissions.

The general nature of an action is thus explained by an elegant writer on the laws and constitution of England : " A person (let us suppose) who has a cause of action, either in a right detained, or an injury done, is determined to bring his action ; and, by his attorney, takes out *process* against the party complained of ; in consequence of which the party complained of (whom we call the defendant), either puts in common or special *bail*, as the case requires. The defendant being thus secured, the plaintiff *declares*, in proper form, the nature of his case. The defendant answers this declaration ; and the charge and defense, by due course of *pleading*, are brought to one or more plain simple facts. These facts, arising out of the pleadings, and thence called *issues*, come next to be tried by a jury. The jury having heard the *evidence* upon the issue before them find (we will suppose) a *verdict* for the plaintiff. On that verdict, a *judgment* is afterward entered. The plaintiff's *costs* of suit are then taxed, by the officer of the court, and the judgment is put in *execution*, by levying on the defendant's effects the damages given by the jury, and the costs allowed by the court ; which being done there is an end of the suit, and both parties are once more out of court."

The explanation just given relates to an action at law, and in some respects it differs from a description of a suit in equity, yet it serves to point out the essential features of all civil actions.

The most general division of actions is usually that of civil and criminal, but since the latter kind of action does not come within the scope of this work, no notice will be taken of that subject. See Code, §§ 4, 5, 7.

Civil actions have heretofore been divided into legal, and equitable ; the former being such as are cognizable by courts of law, and the latter such as are peculiar to the jurisdiction of courts of equity. In this State there are no separate courts of law and of equity, and all remedies, legal or equitable, are administered by the same courts or judges, according to the circumstances of the particular case, although the mode of procedure may differ according to the relief or remedy desired.

A civil action is a legal prosecution, in an appropriate court, by a party complainant, against a party defendant, to obtain the judgment of that court in relation to some right claimed to be

 Nature and definition of actions.

secured, or some remedy claimed to be given, by law, to the party complaining. In every civil action, legally prosecuted, there must be a court having jurisdiction, or it will not be an appropriate court; there must be a party complaining, who brings the action before that court; there must be a party who is charged with doing or omitting to do something, for which he is brought into court; and there must be a subject-matter of litigation; and, upon the whole case the rights of the parties are to be determined by a decision or judgment of the court. See also the cases cited in 2 Wait's Law and Pract. 40; Wait's Code, § 2.

A civil action is one prosecuted for the establishment or recovery of a right, or the prevention of a wrong, or the redress of an injury. It may be instituted by governments, corporations or individuals, to enforce any remedy or secure any relief which the law gives to a complainant against a defendant.

The term "action" includes all the proceedings from its commencement to its termination; and, therefore, the proceeding is called an action until the rendition of the decision, decree or judgment; but it is not so called after that time.

A distinction is sometimes made by applying the term "action" to proceedings at law, and "suit" to those in equity; and the familiar expression is, "an action at law," or, "a suit in equity."

At the common law an action for the recovery of land, without damages, was called a *real action*.

An action for the recovery of some specific personal property, wrongfully withheld by the defendant from the plaintiff, or for a compensation in money for an injury sustained, which compensation is technically called damages, was called a *personal action*.

An action for the recovery of real estate and damages for its illegal detention was called a *mixed action*.

At common law, an *action ex contractu* is one which arises on contract, and is brought for the recovery of damages, or of a thing which belongs to the plaintiff. These actions were account, assumpsit, covenant and debt.

A personal action, *ex delicto*, was for the redress of a wrong unconnected with contract, and the actions were case, trover, detinue, replevin and trespass.

A *local action* is one which must be brought in some particular locality, whether that place be fixed by common law or by statute.

Nature and definition of actions.

A *transitory* action is one which may be brought in any county which the plaintiff may prefer.

An action *in personam* is one in which the proceedings are against the person in contradistinction to those against specific things or *in rem*. An action *in rem* is one instituted against the thing in contradistinction to personal actions, which are said to be *in personam*.

In this brief explanation of the nature of actions, the discussion has been limited to such matters as pertain to the practice, as distinguished from a study of the general rules of law, or the principles of equity. It must not, however, be supposed, that this omission rests upon the ground that the latter study is not deemed important. On the other hand, let the student at all times remember that his only hope of eminent success in his profession must be founded upon the possession of a profound, an accurate, and an available knowledge of all the general rules of the common law, and of the principles of equity.

CHAPTER II.

OF SOME OF THE PRINCIPAL DISTINCTIONS BETWEEN LEGAL ACTIONS, AND EQUITABLE SUITS.

ARTICLE I.

LEGAL ACTIONS.

Section 1. In general. Legal rules and principles must be expressed in general terms, and, therefore, it must sometimes happen that there are cases within the words but not within the reason or the spirit of the rule; while there are other cases within the meaning but not within the words of it. The reason of this is evident on the slightest examination, since it will readily be conceded that it is impossible for any one to foresee or provide for the endless series of complicated occurrences which must take place in society. And, whenever a case occurs which does not fall within the provisions of the general rules, there is a defect to be supplied, or injustice must result from that cause. In many of these cases, courts of equity have devised and applied such rules as a reasonable and just man would have provided had he foreseen the circumstances of the case, and had he authority to establish a rule for it. In some cases the legislature have enacted laws designed to provide remedies or rules in which the common law was found to be deficient.

The remedies afforded by the common-law courts are limited by the rules of the common law, which, as a general thing, are fixed and unbending; and one of the settled maxims of that system is, that a decided point furnishes the rule for future similar cases. In addition to this, the character of the process, pleadings, mode of trial, and the judgment all tend to reduce the application of remedial justice to the enforcement of these fixed rules, instead of attempting to investigate the complicated equities which exist in so many cases, and in which no adequate relief is to be obtained except through equitable interference. From this general statement it will be seen that one of the distinguishing features of common-law remedies is, that they are usually unattainable except by the application of fixed, distinct

Legal actions relate to some act done or omitted.

rules, through the aid of a court, which seeks to apply and enforce these general rules to all cases, instead of investigating and securing any peculiar equities which may exist in some particular case or class of cases.

This system, which may seem harsh in some of its aspects, has, nevertheless, one very valuable feature, and that is, it is admirably adapted to the important end of securing certainty and uniformity in the administration of the law, a result which is invaluable to a commercial people.

Section 2. Legal actions relate to some act done or omitted. It is the object of the law to give a remedy in every case which justly requires it. For this purpose the whole body of the law was created; and every important right is so guarded by familiar and public laws that each person may know what those rights are, and what remedy is afforded for an invasion of them. Every person is bound to know the general rules of the law or to submit to the consequences resulting from his ignorance, or his infringement of them. He who wrongfully invades the possession of his neighbor must respond in damages corresponding to the injury done. So he who inexcusably breaks a valid contract must make good the loss which the other party sustains in consequence.

In these cases, it will be observed, the law does not interfere until after the wrongful act has been committed, and it then holds the wrong-doer accountable for the damages resulting from his acts. The whole remedy consists in compensation to the injured party by way of damages assessed against the party in the wrong. The coercive power of the law is limited in its influence upon the parties, by declaring that every violator of its principles must respond in such damages as may be legally assessed against him, and enforced against his property or his person. It is by virtue of this system that most wrongful acts are prevented, and most contracts are performed, for the remedy by way of damages is a most effective one when properly administered. Beyond this species of remedy, the common law does not, as a general rule, extend; and, where a party would prevent the commission of a wrong, or would compel the specific performance of a contract, by means of the process of the courts, he must resort to a court of equity, where such remedies are one of the peculiar features of the system. In some peculiar cases, a resort to a court of equity is to be preferred, because

Remedy is damages — Relief by general rules.

no damages probably attainable would be as valuable as the equitable relief which is certain, if sought. But, as a general rule, the courts of law are adequate to all the emergencies of the case, and they enforce most of the remedies which parties seek through the interposition of the courts.

Section 3. Compensation in damages, or not at all. As has just been seen, the law gives damages for past injuries. But, beyond this relief, a common-law court does not go, for it will not interfere to prevent the violation of a right. It will give damages for the breach of a contract, but a court of equity will do more, it will anticipate the event, and restrain a person who merely shows an intention to break his agreement. It is in those cases in which the damages for past acts would be so small as not to afford an adequate remedy, that the powers of a court of equity are invaluable. In one of these classes of cases the relief obtained is remedial, in the other it is preventive, or, in other words, in one case it is legal, in the other equitable. Where these courts are separate, it is a general rule that neither court will usurp the functions of the other. And therefore if the injury complained of be completed, so that compensation alone can be awarded, a court of equity will not interfere, even though it might, in its discretion, have power to do so.

So, on the other hand a court of law will not entertain an application where no breach of contract has occurred, or no wrongful act has been done, even though it has power to issue an injunction under some circumstances.

In those States in which legal and equitable remedies are enforced by the same court, some of these distinctions may seem to be of no importance, and yet it is to be remembered that the mode of proceeding which is to be adopted must be legal or equitable as the case may require, as will be fully explained elsewhere.

Section 4. Affords no relief outside of the general rules. At common law, simplicity and certainty in the practice is a prominent object, and, while the rules are so general as to be readily applied to the facts of each particular case, yet they cannot be so extended or varied as to meet the requirements of a system so complicated as some of the remedies afforded by a court of equity. And it is, therefore, a general rule, that the common-law courts do not afford any relief outside of its general system of legal remedies. If other relief is sought, a different court must furnish it, or the party may be remediless.

No specific performance — Preventing wrongs.

At common law, the judgments are uniform, simple and invariable, according to the nature of the action. In equity, the relief is modified to suit all the exigencies of the case fully and circumstantially; authoritative and binding declarations are made concerning the rights alleged; specific things are directed to be mutually done or permitted; and the conduct to be observed by the numerous parties is pointed out, although such parties may sustain relations of widely different characters, or be influenced by interests of a conflicting or important nature.

Section 5. Do not compel specific performance of contracts. This subject has already been alluded to, but it is important that the student should understand the nature and the extent of the powers of courts of law, and of equity, if he would act intelligently in the pursuit of remedies.

There is no class of cases, perhaps, in which the want of power in a common-law court is more seriously felt, than in this one relating to the performance of contracts. In many cases, such a performance in good faith, is of the utmost importance to the party who asks that it be carried out. His plans and other contracts may have been based upon its due execution, and his liabilities to others, as well as other consequent losses, may be such that no damages which would be given would make good. There are some instances, in which the contract relates to the personal conduct of a party, which no court will undertake to require to be literally performed, as a contract to sing at a theater, or write a book, or keep an inn, or build a house, for the reason that no degree of compulsion which the court could exercise would secure the desired result. But if the contract contains a negative clause, such as an agreement not to sing at any other theater, or not to write books for others or the like, there a court of equity will interfere by restraining the party from violating the negative clause. But in all such cases a court of law would be powerless except to give damages for the breach of the contract. The student will recollect that these remarks treat the matter as though there were separate courts of law and equity, instead of a single court which exercises the powers of both those courts.

Section 6. Does not prevent the commission of wrongs. For injuries to real estate, the common-law actions of trespass, waste, nuisance, and the like, are the remedies usually sought. But, where the injury, if once done, would be irreparable, courts of

Complicated equitable cases — Powers end with judgment.

equity sometimes interfere to prevent the commission of the wrongful act, and this relief a court of common law cannot grant. Any exception to this rule will be found to have a statutory origin.

Section 7. Not adapted to complicated equitable cases. It is the tendency of any system of mere legal principles, when reduced to a practical application, to fail of effecting such justice between party and party as the special circumstances of a case may require, by reason of the minuteness and inflexibility of its rules and the inability of the judges to adapt its remedies to the necessities of the controversy under consideration. And it is accordingly found, that the rules of the common law, when reduced to practice, sometimes become the means of injustice in cases in which special equitable circumstances exist, which the court cannot take cognizance of because of the precise nature of common-law principles, their inflexible character, and the technical rules of pleadings and practice which were designed for no remedies except such as the common law afforded. To remedy these inconveniences, and to prevent injustice, the flexible, convenient and just system of equitable remedies was devised, until there are, at the present time, but few, if any, cases, in which the courts will not furnish all proper relief, in some form, if applied for in due time and in a proper manner.

Section 8. Powers of the court terminate with the judgment, and its enforcement. At common law, a final judgment, when once entered, exhausts the powers of the court, except in the way of proceedings to review or reverse it. There is no power to open the judgment for the mere purpose of rendering a different judgment upon the same facts, or for the incorporation of facts not noticed upon the rendition of the judgment. If the judgment was regular and legal upon the facts established, the judgment is final and conclusive. If it was irregular, or illegal, the remedy is by way of proceedings to obtain its reversal. And even an action will not lie at common law for the purpose of obtaining some relief or remedy to which the party was entitled, but which he neglected to present before the rendition of the previous judgment.

Courts of equity exercise much greater powers for the purpose of modifying their decrees, or for their impeachment when they are not such as justice and equity would sustain.

Section 9. Extension of remedies by common law. The extension of remedies by the common law is not by devising new rules or principles, but by the application of existing rules to new combinations of facts, or to new cases which ought to be included in the settled rule. And, in the multiplicity of reported cases, it is a surprising fact that so many of them turned upon the question whether the conceded rule had been properly applied in the particular case, instead of the point whether there was such a rule as that claimed to be law. Courts of law do not usually claim or exercise the power of devising or creating new principles of law, but limit themselves to the administration or application of such principles as are recognized as the law of the land. And yet, such is the extent, variety and complication of human affairs that require to be settled by the courts, that it will be found that the simplest rule has been applied in a great number of cases which differ widely in the facts of each case; and it may seem in some instances as though a new rule had been adopted and enforced in some of them. Courts of common law, in a great variety of cases, adopt the most enlarged and liberal principles of decision; and, indeed, often proceed, as far as the nature of the rights and remedies, which they are called upon to administer, will permit, upon the same doctrines as courts of equity. This is especially true, in regard to cases involving the application of the law of nations, and of commercial and maritime law and usages, and even of foreign municipal law. 1 Story's Eq. Jur., § 34. In matters of mere practice the common-law courts possess and exercise greater powers in the adoption of ordinary rules of practice than in any other respect; and practice, it must be remembered, is but the application of those remedies which the law provides by its general rules.

Section 10. Exceptions to general legal rules. When a rule of law has become well settled, the courts cannot properly disregard it. And in the application of this principle, it occasionally happens that a general rule, if strictly enforced, would be productive of hardship or injustice in some classes of cases. But it is to be remembered that an inconvenient or unjust rule of law may be remedied by the legislature; and, until that is done, it is best, as a general rule, to abide by the adjudged cases; for an attempt to change the rule by a judicial decision tends to unsettle the law; and it has been said by an able judge that "Hard cases make bad law." And the general practice is, to apply and en-

Tries questions of fact by a jury.

force well-settled rules, even when they cause a hardship in some particular case. *Vermilya v. Austin*, 2 E. D. Smith, 208; *Beaulieu v. Finglam*, cited in argument in *Reedie v. London and North Western R. R. Co.*, 4 Exch. 251; *Freeman v. Tranch*, 14 Eng. Law and Eq. 224, 227; 12 C. B. 406; *Supervisors of Onondaga v. Briggs*, 2 Denio, 32.

There are instances, however, in which a subsequent case may resemble a former one in many of its principal facts, and yet it may also contain some important facts or elements which will bear upon the decision, and, when this is the case, courts frequently act upon the principle of distinguishing the latter case from the former; and by that means are enabled to render such a decision as the justice of the case may require. *Quinn v. Lloyd*, 41 N. Y. (2 Hand) 353. But, while it is proper to act upon a substantial distinction, the courts cannot properly carry the rule so far as to act upon unsubstantial and shadowy distinctions which do not affect the merits of the case. Such distinctions have properly been termed by the courts nice, subtle, refined, thin, slight or slender, and they have frequently refused to act upon them, and yet, if the courts adopt or make a distinction, the decision is to be followed like any other established rule. It is not desirable to multiply distinctions, as they cannot fail to introduce uncertainty into the law, and in their subsequent applications to other cases may cause as much hardship as would have resulted from enforcement of the general rule.

Distinctions in the decision of causes are not always founded upon the principle that the court does not approve of the rule laid down in the previous case; for such decision may be fully concurred in, and yet the facts of the subsequent case may be so different in some particulars as to require the decision to be founded upon or modified by them.

Section 11. Tries questions of fact by a jury. In common-law actions the right of having questions of fact tried and settled by the verdict of a jury is as much fixed, as are the rights of the parties clear under the rules of the law.

To explain the origin of this mode of trial, or to trace its history, or explain its advantages, is not the present object; but rather to point out the distinction between this method of trial and that adopted in courts of equity which, as a general rule, dispense with the aid of juries, and try questions of fact before the court itself, upon such evidence as may be proper. And when

Legal remedies may exist, and yet be insufficient.

the nature of the two systems of remedies is considered, the propriety of the practice in each case will be evident. In simple direct issues, the verdict of a jury would be convenient, safe, and satisfactory. But, in a case involving numerous issues, of an intricate nature, requiring many different special directions, such a trial would be a poor substitute for the careful, elaborate and equitable relief which may be awarded by a profound and conscientious judge who takes time to survey the whole case even to its minutest details, and then pronounces a decree which guards all the rights of both parties. A trial by a referee is not overlooked, but as it is a mere substitute for a trial by jury, it does not require notice in this place.

Section 12. Legal remedies may exist, and yet be insufficient. There are many cases in which the common-law courts furnish a partial though defective remedy, while courts of equity afford the fullest relief. To explain fully the particulars in which such relief may or may not be had at law, or to enumerate all the instances in which partial relief is attainable, is not to be expected in this place. A general synopsis of some of the cases will be convenient as an illustration of the defects mentioned.

At common law a corporation might have a good cause of action against one of its members, and yet, at law, no action could be brought upon it, while equity would give full relief. The same rule applies to the case of executors or partners. *Cole v. Reynolds*, 18 N. Y. (4 Smith) 74; *Gridley v. Gridley*, 24 N. Y. (10 Smith) 135, 136. See *Denman v. Prince*, 40 Barb. 213, 217, 218, 219; *Kingsland v. Braisted*, 2 Lans. 20, 17. So in replevin, if the property claimed could not be described with the requisite certainty, a court of equity alone could give the desired aid. An action of account is a common-law remedy, but if the taking of an account is important, the powers of a court of equity are far more desirable than the common-law action.

A set-off could not be made available at common law, but for a long time past this defect has been remedied by the statute. Before these statutes a court of equity alone was the proper forum to resort to in such cases.

An action for the recovery of dower is given by the common law, but there were superior advantages for the widow if she applied to a court of equity, in her comparatively helpless condition, and for the advantage of being better able to ascertain in what estates she had a right of dower. The same principles

Courts of equity act on the person independently of damages as a remedy.

were applicable to cases in partition, or in setting out boundaries. These, and other similar cases which might be mentioned, seem to show that many remedies are common to both courts of law and of equity, and that each court has some advantages over the other in the administration of the law ; and if this outline shall serve to render the subject more clear to the student, the object in view will have been attained.

ARTICLE II.

EQUITABLE SUITS.

Section 1. Courts of equity act on the person independently of damages as a remedy. There is no feature of relief or remedy, afforded by the courts, of a higher value than that of acting directly upon the person of the party who would deliberately violate his contracts, or invade the possessions of another. The relief given by a court of equity may be described as of a positive character, giving the specific thing which the parties are entitled to, while actions at law, with few exceptions, give only the negative remedy of compensation by damages for a deprivation or violation of the true right. 3 Broom & Had. 65, 66.

Wherever possible, equity takes care that a right shall be actually enjoyed, and with this view will interfere to prevent a violation of that right. A court of law will not interfere till the violation be effected. It, for instance, will, when a breach of covenant in a lease or in a contract between land owners has been committed, give damages for the breach ; but a court of equity will do more, it will anticipate the event, and restrain a person who merely shows an intention to break his covenants. Or, to take another example illustrating the beneficial result obtained by such ready interference, damages will be given in the one court if a man has been carrying on a trade in some particular locality in violation of his contract with another man not to do so. But these damages, which will be only given for past acts of trading, are, it may be, of small value as a remedy compared with the effectual relief which the other court gives by prohibiting the trade on pain of imprisonment. *Ib.* The two kinds of justice which may be obtained, the one strictly remedial, the other preventive, in respect of the violation of continuing rights, are clearly different in kind ; one is legal, the

Equity compels the performance of acts specifically.

other equitable; and neither of the two courts will usurp the functions of the other. *Ib.*

A clear illustration of the advantages of an equitable remedy over that afforded by a common-law court may be seen in the case of compelling a party to convey lands which are situated in another State. *Gardner v. Ogden*, 22 N. Y. (8 Smith) 327; *Fenner v. Sanborn*, 37 Barb. 610; *Bailey v. Ryder*, 10 N. Y. (6 Seld.) 363; *Newton v. Bronson*, 13 N. Y. (3 Kern.) 587. And yet a common-law action will not lie here for a trespass upon real estate lying in that State. *Watts v. Kinney*, 6 Hill, 82; *Hurd v. Miller*, 2 Hilt. 540; *Mott v. Coddington*, 1 Abb. N. S. 290; 1 Rob. 267; *Wait's Code*, 24, 25, 26.

In such case the court has no jurisdiction, unless the person to whom its orders or decrees are addressed is within the reach of the court or amenable to its jurisdiction. The person must be not only within the reach of the court as to locality, but he must have such a character as shall render him personally amenable to the jurisdiction. See *Parties to Action*.

The fact that the orders and decrees of the court operate immediately upon persons has had the effect of giving the court a very extensive jurisdiction. As a consequence of this rule, the court may exercise jurisdiction quite independently of the locality of the act to be done, provided the person against whom relief is sought is within the reach and amenable to the process of the court. In exercising the jurisdiction, the court does not lay any claim to the exercise of judicial or administrative rights in a foreign country, but proceeds solely on the circumstance that the person to whom the order or decree is addressed is within reach of the court.

Section 2. Equity compels the performance of acts specifically. Another breach of the same kind of positive relief is the power which the court exercises of compelling the specific performance of agreements. A man may be indirectly compelled to carry out his contract by the fear of being mulcted in damages by a court of law, in the event of his failing to do so; but another and often a desirable mode, is to insist upon his performing the duty which he owes under the contract by putting him in prison till he does so. 3 *Broom & Had.* 67. See the next preceding section.

Rights which are recognized and protected, and wrongs which are redressed by common-law courts, are called legal rights and

Equity compels the performance of acts specifically.

legal injuries ; rights which are recognized and protected, and wrongs which are redressed by courts of equity, are called equitable rights and equitable injuries. The former are said to be rights and wrongs at common law, and the remedies, therefore, are remedies at common law ; the latter are said to be rights and wrongs in equity, and the remedies, therefore, are remedies in equity.

The distinction between courts of common law and courts of equity will be better understood by considering the different natures of the rights they are designed to recognize and protect, the different natures of the remedies which they apply, and the different natures of the forms and modes of proceeding which they adopt to accomplish their respective ends.

In all strictly common-law courts, there are certain prescribed forms of action to which the party must resort to furnish him a remedy ; and, if there be no prescribed form to reach such a case he is remediless ; for these courts do not entertain jurisdiction except in certain actions, and they give relief according to the particular exigency of such actions, and not otherwise. In those actions none but a general and unqualified judgment can be given, which is either for the plaintiff or for the defendant, without any adaptation of it to particular circumstances.

There are, however, many cases in which a simple judgment for either party, without qualifications, or conditions, or peculiar arrangements, will not do entire justice to either party. Some modifications of the rights of both parties may be required ; some restraints on the one side or on the other, or, perhaps, on both sides ; some adjustments involving reciprocal obligations, or duties ; some compensatory or preliminary, or concurrent proceedings to fix, control or equalize rights ; some qualifications or conditions, present or future, temporary or permanent, to be annexed to the exercise of rights, or the redress of injuries.

In all these cases, courts of common law cannot give the desired relief. They have no forms of remedy adapted to the objects. They can entertain suits only in a prescribed form, and they can give a general judgment only in the prescribed form. Hence by their very character and organization they are incapable of furnishing the remedy which the mutual rights and relative situations of the parties, under the circumstances, positively require.

But courts of equity are not so restrained ; although they have prescribed forms of proceeding, the latter are flexible, and may

Equity restrains the commission of wrongful acts.

be suited to the different postures of cases. They may adjust their decrees so as to meet most, if not all, of these exigencies ; and they may vary, qualify, restrain, and model the remedy, so as to suit it to mutual and adverse claims, controlling equities and the real and substantial rights of all the parties. Nay, more ; they can bring before them all parties interested in the subject-matter, and adjust the rights of all, however numerous, whereas, courts of common law are compelled to limit their inquiry to the very parties in the litigation before them, although other persons may have the deepest interest in the event of the suit. So that one of the most striking and distinctive features of courts of equity is, that they can adapt their decrees to all the varieties of circumstances which may arise, and adjust them to all the peculiar rights of all the parties in interest ; whereas, courts of common law are bound down to a fixed and invariable form of judgment in general terms, altogether absolute, for the plaintiff, or for the defendant.

Section 3. Equity restrains the commission of wrongful acts. Courts of equity possess a power of restraining the person in relation to particular acts, which is not only a useful but most efficient remedy. The principle upon which the court acts is, that whenever damage is caused or threatened to property, admitted or legally adjudged to belong to the plaintiff, by an act of the defendant, admitted or legally adjudged to be a civil wrong, and such damage is not adequately remediable at law, the inadequacy of the remedy at law is a sufficient equity, and will warrant an injunction against the commission or continuance of the wrong. And though damages cannot be given in equity for the plaintiff's loss, yet, in some cases, if the defendant has made a profit, he will be decreed to account. Adams' Eq. 207. See *ante*, 16, § 1.

The equity is not confined in principle to any particular acts; those in respect of which it is most commonly enforced are five in number, viz.: waste, destruction, trespass, nuisance, infringement of patent right, and infringement of copyright.

There are three incidents connected with this equity which ought to be mentioned. The equity attaches only on an admitted or legally adjudged right in the plaintiff, admitted or legally adjudged to be infringed by the defendant ; it prohibits the continuance as well as the commission of a wrong ; and it extends to an account of the defendant's profit. Adams' Eq. 217.

The relief afforded in equity is either remedial or preventive. The court either grants positive and affirmative relief, or restrains the doing of acts which are against equity and conscience. In giving remedial relief, the court usually proceeds by decree, while preventive relief is administered by injunction.

Section 4. Equity generally acts without the aid of a jury. The right to trial by jury in common-law actions, as a matter of course and of right, does not exist in courts of equity. It is one of the fundamental rules of equity practice, that questions of fact are to be decided by the court without the intervention of a jury. And from the nature of the issues to be tried, and the peculiar equities to be administered, this mode of trial is an advantageous one. In disposing of causes, a court of equity does not always render a final decision at once, as upon the trial of a cause by a jury; for, there may be numerous issues or facts to be investigated, before a final decree can be properly made. If a preliminary decree is proper, it is usually in such cases as the following: 1. That in the course of the suit a dispute has arisen on a matter of law, which the court is unwilling to decide; 2. That a similar dispute has arisen on a matter of fact; 3. That the equity claimed is founded on an alleged legal right, the decision of which the court of chancery declines to assume; and, 4. That there are matters to be investigated which, although within the province of the court, are such as the presiding judge cannot at the hearing effectually deal with. *Adams' Eq.* 375. To obviate these impediments the preliminary decree directs: 1. A case for a court of law; 2. An issue for a jury; 3. An action at law, to be determined in the ordinary course; or, 4. A reference to one of the masters of the court, to acquire and impart to it the necessary information. *Ib.* Each of these methods of inquiry may be also adopted on interlocutory applications by motion or petition. *Ib.* The particular cases or circumstances which may require such proceedings will be elsewhere explained.

Section 5. Relief granted or refused as justice requires. The principles upon which the jurisdiction of courts of equity proceed are these, conscience, good faith, honesty and equity. And, in the exercise of its powers, one general maxim in early times was, that chancery would take cognizance of such cases only as were not remediable by the common law. But this jurisdiction was not merely suppletory, it was also corrective. In some cases it gave relief where none could be had at law; and, in other

Grants relief where the law does not.

cases it interfered to relieve against proceedings taken in courts of common law.

In equity, the term *conscience* originally embraced those obligations which result when one person is placed in any situation as regards another, that gives the one a right to expect, on the part of the other, the exercise of good faith toward him. The determination of cases according to *equity*, embraced all those instances in which a party, who has not committed any act contrary to good faith or conscience, but who may yet, according to the strict rules of positive law (which may, in their general application, be founded on natural justice), or by the silence of the law in not providing at all for some particular case, have an advantage which it is contrary to the principles of equity that he should enforce or retain. In such cases, a resort was had to the general principles of equity, in the sense of natural justice, which are antecedent to all positive law. In proceedings thus founded upon right, justice and conscience, the court took cognizance of cases in which there was no remedy at law; and it might also decline to interfere when the claim made was such that a court of equity could not, according to its principles, enforce it; and, as a result of this system, the court could in many cases grant or refuse the relief sought, according as justice might dictate.

But a court of equity will not in any case allow itself to be made an instrument of injustice. And where a court of equity by its interposition to prevent an act rightfully or wrongfully intended, has caused the loss of a remedy at law, this court will give him a remedy equivalent to that from which the interposition of the court debarred him. *Pulteney v. Warren*, 6 Ves. 73; *Brown v. Newall*, 2 M. & C. 558, 572.

Section 6. Grants relief where the law does not. Courts of equity proceed upon the principle that they will grant relief in those cases in which it ought to be granted according to equity, but where no remedy is given by the common law. This omission may arise in those cases in which the rules of the common law have made no provision for a case like the one presented for adjudication; or it may be that the rules of practice of the courts of law do not meet the requirements of the particular case, and thus fail to give any remedy, or, a very inadequate one.

The remedial process, the pleadings and practice of courts of equity, are all so framed that the party may obtain every relief

Equity is governed by settled rules and principles.

consistent with equitable principles. And the final remedial process may be so varied as to meet the requirements of these equities, in those cases in which the jurisdiction of the court exists, by commanding what is right, and forbidding what is wrong, and then enforcing the decree made. A court of equity has jurisdiction in cases of rights, recognized and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in the courts of common law. The remedy must be plain ; for, if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate ; for if at law it falls short of what the party is entitled to, that founds a jurisdiction in equity. And it must be complete ; that is, it must attain the full end and justice of the case. It must reach the whole mischief, and secure the whole right of the party in a perfect manner, at the present time, and in future ; otherwise equity will interfere and give such relief and aid as the exigency of the particular case may require. The jurisdiction of a court of equity is, therefore, sometimes concurrent with the jurisdiction of a court of law ; it is sometimes exclusive of it ; and it is sometimes auxiliary to it.

Section 7. Equity is governed by settled rules and principles. Courts of equity had their origin in the wants of suitors who failed to obtain a remedy through the aid of common-law courts. And, in many instances, equity gave proper relief when the law courts had no means of affording the desired and needed remedy. In the contests between the courts of law and those of equity, at an early period, it was sometimes said that the latter courts were not governed by settled rules, but acted upon an arbitrary discretionary power. But, waiving that question, it is sufficient to state, that for a long period the powers of these courts, and the rules and principles upon which they proceed, are as well settled as those of the common-law courts.

The object of a court of equity was to afford relief in those cases in which no legal relief was attainable. But it has also been said that it was the business of a court of equity to abate the rigor of the common law ; and, while it may be conceded that, in some cases, the interference of a court of equity has had this effect, yet all the rules of the common law which equity has taken upon itself to overrule have long since been well defined, and many of them have ceased, even at common law, to govern the judgments of the courts. 3 Broom. & Had. 54. The

Equity devises new remedies.

educational course, which courts of equity seem to have furnished to courts of law, has been long so far completed, that no new doctrines in equity opposed to the rules or doctrines of courts of law have been established. *Ib.* 55. Nor does equity, even now, profess to criticise or review decisions of courts of law; moreover, it does not, and never did, interfere to mitigate the severity, where any exists, of rules of positive law. There are, however, some of the early cases in which equity has very nearly, if it has not absolutely, overridden positive law; and those cases relating to the statute of frauds serve as well as any to show how far the power has been exercised. *Ib.* 56.

There are certain principles, on which courts of equity act, which are very well settled. The cases which occur are various, but they are decided on fixed principles. Courts of equity have, in this respect, no more discretionary power than courts of law. They decide new cases as they arise by the principles on which former cases have been decided, and may thus illustrate or enlarge the operation of those principles; but the principles are as fixed and certain as the principles on which the courts of common law proceed. *Bond v. Hopkins*, 1 Sch. & Lefr. 428, 429.

This application of existing principles to new cases as they arise is not peculiar to courts of equity; for the common-law courts are daily engaged in adding to the principles of the old jurisprudence, and in enlarging, illustrating and applying legal maxims and rules.

Section 8. Equity devises new remedies. The numerous cases in which equity interfered and granted relief where none was given before has given rise to the opinion that courts of equity devise new remedies. When it is said that equity grants relief, while at law the complaining party was remediless, it might seem like a new remedy; and yet, it will be remembered that such relief was in accordance with well-settled principles of equity. But, even if it were assumed that courts of equity did, at an early day, exercise the power mentioned, it must be remembered that this court is now as much controlled by general laws as any other court. And while it is proper that all courts should freely exercise their powers for the advancement of justice, it is the part of wisdom and of safety for all courts to keep clearly within the limits of their jurisdiction; and, if additional powers are required, to leave that matter with the legislature.

Section 9. Mode of relief differs more than principles of law. The law speaks but one language, for all courts, in reference to the legal rights of the parties involved in a litigation. But, in matters of mere practice, there is a wide difference between courts of equity, and those of law, and, in many instances, it is the sole difference to be considered by the party seeking to have his rights determined by a court.

Section 10. General rules and maxims of equity. In actions at law, every party may stand upon his strict legal rights, and the court is bound to give the remedy which the law has provided. In courts of equity, there are some rules and maxims which seem more like the exercise of a discretionary power, as they doubtless are, in some instances.

First. If equity once had jurisdiction of the subject-matter because there is no remedy at law, or because that remedy is inadequate, it does not lose the jurisdiction merely because the courts of law afterward give the same or a similar relief.

Second. Equity follows the law. This is true as a general maxim. Equity follows the law, except in relation to those matters which give a title to equitable relief because the rules of law would operate to sanction fraud or injustice in the particular case.

Third. Where there is equal equity the law must prevail. The ground upon which the suitor comes into a court of equity is that he is entitled to relief there. But, if his adversary has an equally equitable case, the complainant has no title to relief, and the court will not interfere on either side.

Fourth. Equality is equity. This rule is applied to cases of contribution, apportionment of moneys due among those liable to, or benefited by the payment, or abatement of claims on account of deficiency of the means of payment, etc.

Fifth. He who seeks equity must do equity. A party cannot claim the interposition of the court for relief unless he will do what it is equitable should be done by him as a condition precedent to that relief.

Sixth. Equity considers as done that which ought to have been done. The illustrations of this rule will be found in works upon equity.

Seventh. He who has committed iniquity shall not have equity. As in cases of illegal contract, or where a party has put his property out of his hands to defraud his creditors, a court of equity will not restore the party to his former condition.

General rules and maxims of equity.

Eighth. Equity suffers not a right without a remedy. This maxim is generally, though not universally, true.

Ninth. When the equities are equal in other respects, he who is first in point of time will secure the advantage. But if the equities are unequal, preference will be given to the superior equity.

Tenth. The fund which has received the benefit should make satisfaction. Again, satisfaction should be made to that fund which has sustained the loss.

Eleventh. Equity acts upon the person. This maxim has been explained *ante*, 16, § 1.

Some of the principal distinctions between legal actions and equitable suits having been thus briefly noticed, our next inquiry will relate to the effect of the union of legal and equitable remedies which are now administered by the same courts in both classes of cases.

CHAPTER III.

UNION OF LEGAL AND OF EQUITABLE REMEDIES.

ARTICLE I.

GENERAL PRINCIPLES.

Section 1. Mode of uniting the two systems. Under the English system, courts of law and courts of equity are separate and distinct organizations, each of which administers the rules of law, or the principles of equity, according to a long-established practice.

The general adoption of this system in many of the States of the Union is familiar to every student. In this State there were formerly courts of law, and also a court of chancery, both of which had existed from an early period, and they continued to exist down to the year 1846.

By the constitution of 1846, it was provided by article 6, section 3: "There shall be a supreme court having general jurisdiction in law and equity." In accordance with this provision, the legislature enacted a law, declaring that the supreme court, organized under this constitution, should have the same powers and exercise the same jurisdiction as that possessed and exercised by the supreme court or the court of chancery of this State. Laws 1847, ch. 280, § 16.

By section 69 (62) of the Code, the distinction between actions at law, and suits in equity, and all the forms of such actions or suits were abolished; and but one form of civil action, for the enforcement or protection of private rights, or the redress of private wrongs, was recognized.

The object of these changes was, to obviate many of the inconveniences arising from a double system of practice, and also to simplify the proceedings in all the courts.

The principles of the common law were generally plain, simple, few in number, and unbending in many instances to suit the exigencies of the particular case to be decided. The result was sometimes inconvenient, if not unjust, and for this reason the court of chancery was established for the purpose of softening

the rigor of the common law, and for doing complete justice by means of forms of proceeding peculiar to itself. But even this system of a double court, with separate forms of proceeding, did not prevent the existence of some inconveniences; and, for the purpose of securing all the advantages, and avoiding all the inconveniences of the former systems, the present system of blending law and equity practice was adopted in this State. In another part of this work an outline of the former systems will be given, before proceeding to explain the details of the present system of practice.

Section 2. Principles of law and equity unchanged. It will be remembered that the matters under consideration relate to the practice of the courts, and not to the general rules of law, nor to the principles of equity, by which rights are to be decided, or wrongs redressed. The rules of law will remain unchanged, whether they are enforced by a court having nothing but a common-law jurisdiction, or by a court of equity, or by a court exercising both a legal and an equitable jurisdiction.

“Although the Code has abolished all distinctions between the mere forms of action, and every action is now in form a special action on the case, yet actions vary in their nature, and there are intrinsic differences between them which no law can abolish. It is impossible to make an action for a direct aggression upon the plaintiff's rights by taking and disposing of his property, the same thing, in substance or in principle, as an action to recover for the consequential injury resulting from an improper interference with the property of another, in which he has a contingent or prospective interest. The mere formal differences between such actions are abolished. The substantial differences remain as before. The same proof, therefore, is required in each of these same kind of actions as before the Code, and the same rule of damages applies. Hence, in an action in which the plaintiff establishes a right to recover, upon the ground that the defendant has wrongfully converted property, to the possession of which the plaintiff was entitled at the time of the conversion, the proper measure of damages still is the value of the property; while in an action in which the plaintiff recovers, if at all, upon the ground that the defendant has so conducted himself in the exercise of a legal right in respect to another's property, as unnecessarily and improperly to reduce the value of a lien, which the plaintiff could only enforce at

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Principles of law and equity unchanged.

some subsequent day, the damages must, of course, depend upon the extent to which that lien has been impaired." *Goulet v. Asseler*, 22 N. Y. (8 Smith) 228, 229, SELDEN, J.

The union of the two systems of law and equity practice has not enlarged the powers of the new court, either as to legal or equitable jurisdiction; in relation to the rights which they may declare; or the remedies which they may enforce. And where an injunction could not have been granted under the former practice by the old court of chancery, it cannot now be granted by the new court, because the equitable jurisdiction of the courts is not enlarged by the union of legal and equitable powers in one court, nor by the provisions of the Code. *New York Life Ins. Co. v. Supervisors of New York*, 4 Duer, 192, 1 Abb. 250.

An action of trover could not have been maintained under the former practice without proof of an unlawful detention or a conversion of the property; and under the Code this proof is equally essential. *Eldridge v. Adams*, 54 Barb. 417. See *Goulet v. Asseler*, 22 N. Y. (8 Smith) 225. Although the Code abolished the forms of actions, yet the principles by which the former actions were governed still remain, and control as much now as formerly in determining the rights of parties. *Ib.*

The abrogation of the distinction between actions at law and suits in equity, by enacting that there should be but one form of action, which should be called "a civil action," did not obliterate the distinction between the two sorts of proceedings, so far as the federal courts are concerned. *Thompson v. Railroad Companies*, 6 Wall. 134. And, if a civil action is brought in a State court, and it is essentially a common-law action, then the common-law form, and not an equitable one, must be pursued if the case is removed into a federal court. *Ib.* An action in a common-law form cannot be prosecuted in a State court up to the removal of the cause to a federal court, and then have the form of the action changed into that of a suit in equity. *Ib.* If the original form of the action was in accordance with the practice of the State courts, no change will be necessary on the removal of the cause, as the federal courts will, in such cases, adopt and apply the practice of the State courts. *Ib.* But this adoption of the State practice is not to be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit. *Ib.*

Section 3. Joinder of actions, whether legal or equitable. Under the former system, a party sometimes erred in the choice of a court in which to obtain a remedy; and the result was delay and expense, if no other loss ensued. A party who instituted a suit in equity, when his remedy was at law, was turned out of that court to begin again; and the same was true, when an action was brought at law in a case where equity afforded the only relief. As the courts are now organized, where the same judge presides in all cases presented for adjudication, no one can be turned out of the supreme court upon the ground that his action was commenced in the wrong court. But, before noticing what causes of action may be joined, it ought to be mentioned that the rules of law and the principles of equity have not been changed or blended, even when legal and equitable remedies are both sought in a single action. Formerly, an action at law and a suit in equity were both essential, in some cases, if full justice was done to both parties. By the present system, it is intended that one action shall attain the same result, with less delay, expense or difficulty than under the old practice. The former courts of law and the old court of chancery each had a separate jurisdiction, and each had a system of practice which differed materially from that of the other. The present system adopts the same practice for all classes of actions, or of remedies, so far as that result is practicable. And, in reference to the mode of commencing actions; the general mode of pleading; the practice on the trial; the mode of entering judgments and of enforcing them; and even the remedy by appeal; there is much that is alike, and where there is a difference, it is in those matters which are required by the nature of the action. But, while many of the proceedings and forms will be the same, whether the remedy sought be legal or equitable, there will be some proceedings and forms required in some classes of actions, which would not be appropriate in, nor would they be adapted to, the other. The same judge may hear an action at law or a suit in equity, and either action may be commenced by a summons; but, even in such a case, there will be some difference in the form of the summons. Again, an action upon a promissory note may require many proceedings, which are essentially like those in a suit in equity, for the adjustment of complicated equities; but yet there are, and there always must be, differences in the mode of conducting these actions. And it will be

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Joinder of actions, whether legal or equitable.

found, on a careful examination, that, except in the uniformity of general proceedings already mentioned, the courts adopt the equity practice in equitable suits and proceedings, and those of the common-law practice in actions at law. In most actions of a legal nature the issues are few and simple, and readily disposed of by a jury; but, in an intricate equity suit, there are many matters which no jury could possibly dispose of in a proper manner. In such cases, the practice in each action must be such as is appropriate under the circumstances; and, while pursuing such a mode, it does not interfere with the aforesaid principle, that the practice in actions at law and in suits in equity have, so far as practicable, been united. The object in blending them was to secure as great uniformity as was attainable, but it was not considered any less important to retain all the advantages of both systems, and to use them whenever the ends of justice and the objects of the law would be best subserved. Uniformity in the practice is not to be limited to an attempt to reduce every kind of action to one form of proceeding, nor will it be secured by applying the same rules of proceeding in every case. In equitable actions there are, in nearly all cases, many steps to be taken which would not be proper in an action at law, and yet they are indispensable in equity proceedings. This difference does not in any manner interfere with the general rules of practice, which are equally applicable to either class of actions. Consistency in relation to joining actions at law and suits in equity does not require that the practice should be uniform in all particulars, for that is plainly impracticable. When as great uniformity as is practicable is attained, all the advantages of blending the two systems will have been secured. And the next important step will be to adopt a uniform and harmonious practice in relation to each class of actions, whether legal or equitable. And it is just here that some of the most perplexing questions have arisen. The present practice is much of it founded upon statutes, and the difference of opinion among judges in construing them has been greatly increased by the large number of judges who have decided the various questions as they arose in the course of actions. Material differences in the minds of the judges, and of their various modes of study and practice, in addition to the fact that many cases were decided without the aid of previous decisions, which were not then reported, have all tended to increase the number of contradictory

adjudications. These inconveniences had, however, some corresponding advantages ; for, if each judge had decided all his cases without the aid of previous decisions, there would remain the advantage of his own unbiased judgment, acting independently of authority, and thus securing the reasoning of a strong mind after a thorough examination of the case. Conflicting decisions upon the same question are a serious inconvenience in the practice, and they have been somewhat the cause of incongruities in the practice. But much of this evil may now be avoided, for it may be safely said, that most of the difficult questions in the practice are now settled by a clear current of authority.

In some instances the true rule is so well settled that no one would question what the rule is. In other cases, there may be a conflict in the authorities, but even these cases are less numerous than one might imagine on a first thought ; and, after a careful examination of all the authorities and the statutes, the true rule may be discovered, and a harmonious system laid down for the convenience of the student, the profession and the courts.

CHAPTER IV.

RIGHT OF ACTION.

ARTICLE I.

IS A REMEDY GIVEN BY LAW.

Section 1. In general. The present work was not intended to furnish information as to the rights of action, or as to the grounds of defense ; but rather to treat fully the mode of prosecuting or defending actions, or other proceedings in the courts of record. There are, however, some general suggestions of great importance in relation to the rights of action, or the grounds of defense, which ought to be made here. The rights of person and of property are numerous and frequently conflict, and the injuries done to them are frequent and serious. To learn with certainty whether the complaining party has any remedy, either at law or in equity, is sometimes quite difficult. And, for that reason, the first inquiry which naturally arises on the statement of the case is, whether an action or legal proceeding can be maintained. It is generally difficult to lay down any general rule which has no exceptions. And, as an illustration of this, it may be said, as a general rule, that there is no wrong without a remedy, and, again, there is no right without a remedy, for the want of a right and the want of a remedy are reciprocal. But, as we shall soon see, there are injuries for which the law does not furnish any remedy.

In every proceeding in a court of justice the object is, or ought to be, the establishment or recovery of a right, or the prevention of a wrong, or to furnish redress for the wrong if already committed. And no one can properly resort to a court of justice until his right has been disputed, infringed upon, or threatened by a wrongful act, for it is the injury done to him which confers on the party wronged a right to demand that redress which the law gives for the injury sustained.

Before instituting an action, the first question is, whether, upon all the facts that can be established, any remedy can be had, either of a legal or an equitable nature. If this inquiry is de-

 Are there sufficient existing facts.

terminated in the negative, the matter is at an end. But if answered in the affirmative, then other considerations will be weighed before proceeding in the matter.

Where a party has a legal right to do a particular act, the motive with which he may assert his right will not give a right of action even where malice prompted the act. *Mahan v. Brown*, 13 Wend. 261; *Auburn & Cato Plank Road Co. v. Douglass*, 9 N. Y. (5 Seld.) 444; *Chatfield v. Wilson*, 28 Vt. 49; *Occum Co. v. Sprague Manuf. Co.*, 34 Conn. 530; *Stevenson v. Newnham*, 13 C. B. 285. When malice will be considered, see *Lumley v. Gye*, 2 Ell. & Bla. 216; *Cotterell v. Jones*, 11 C. B. 713.

The consent of a party to an act is generally a bar to an action for any injury sustained in consequence. *Illinois Central R.R. Co. v. Allen*, 39 Ill. 205. And see Broom's Legal Maxims, 201. *Volenti non fit injuria*.

Section 2. Are there sufficient existing facts. No part of the practice presents greater difficulties, or furnishes sharper conflicts than the establishment of the facts claimed by the respective parties to exist, and to be precisely as each party claims they are. One of the most important questions, then, is to settle whether there are such facts as the complaining party alleges. And, before considering any other point, the first investigation will be as to the actual existence of the alleged facts. If it is doubtful whether the facts ever really existed, this difficulty may be insuperable. Again, let it be supposed that the facts once really existed, but that at the present time they cannot be established by proof; in such a case it must be recollected that where the court cannot take judicial notice of a fact, it is the same as if the fact had no existence. In the next place, let it be assumed that the facts once existed, and that some proof thereof may be made, the next inquiry will be whether the opposite party is able to adduce satisfactory countervailing proofs, and, in that case, to determine whether, for all practical purposes, the facts are not really the same as though they were non-existent.

One further consideration ought not to be overlooked, and that is in relation to the preservation or perpetuation of evidence which may now be attainable, but which may be lost by the death of a single witness, or the destruction of some important document. In every such case there ought not to be any delay in taking such steps as will preserve the evidence.

Actions for injuries to person — To property.

An action does not lie against two persons for conspiring together, maliciously and vexatiously, and without reasonable or probable cause, to commence, and for commencing, an action against the plaintiff, in the name of a third person, but for their own benefit, without there is an allegation of legal damages resulting to the plaintiff therefrom. *Cotterell v. Jones*, 11 C. B. 713. Whether or not it will lie *with* such an allegation,—*quere*. *Ib.* See 2 R. S. 551, § 1; *Craig v. Twomey*, 14 Gray, 486.

Section 3. Actions for injuries to person or personal rights. The numberless injuries which may be done to the person, or to personal rights, have furnished materials for a vast collection of large volumes; and a resort must be had to them and to the reports and statutes for full information. Two inquiries ought always to be made and satisfactorily answered, before instituting an action. First. Are the facts such that, upon the whole case, independently of any defense, the law will give a right of action. Secondly. Can the defense establish facts which will constitute a complete answer or bar to the action, by showing a legal excuse or justification for the acts done. These questions may not always be easy to dispose of, but their examination is an imperative duty.

Section 4. Actions relating to property, real or personal. This subject, like the last preceding one, is so vast that nothing more will be done than to remind the student of the importance of a thorough knowledge of the law relating to such property. There is no mode by which a title to it can be acquired that may not be a subject of investigation. There is no wrong which can be done to it which may not need the aid of the courts. And there is no contract which can be made in relation to it that may not become a subject of inquiry.

If the inquiry involves a question of title, then it will be necessary to examine the particular kind of title which is claimed to exist. If the right of possession is in dispute, this question may require much labor to solve it. If the action be for a wrong done to such property, the right of the complainant thereto, his right of possession at the time of the injury, and the right of the defendant to do the acts complained of, may all become important. In brief, nothing that relates to the title, the right of possession, or the claim made by the defendant, is to be overlooked, and to point them out in detail is beyond the scope of this work.

Fraud in obtaining personal property is a wrong to property,

and an action lies as clearly as for a wrongful taking or conversion of it. *Cleveland v. Barrows*, 59 Barb. 364.

Section 5. Actions founded upon contracts. Some of the most important interests in society are based upon contracts, express or implied, and as actions are daily brought for the breach of such contracts, so the whole law on that subject must be a constant subject of investigation. Some few elements of contracts must always be kept in view when investigating rights claimed to be founded upon contract. There must be a subject-matter of the contract; a sufficient legal consideration; an assent given by parties legally competent; an agreement, express or implied, to do or omit some specified or understood thing; the contract must be executed in due form of law, and it must not be illegal in its nature or provisions. Some one or more of these matters require attention in every case where a remedy is claimed by virtue of a contract, or where a defense resting on contract is interposed.

Section 6. Actions founded upon torts. The infinite variety of injuries which may be done to person, to personal rights, or to property, real or personal, affords a wide field of investigation as to rights and remedies. It would be an endless task to enumerate all the wrongs of which the law takes cognizance, and in respect of which redress, in the shape of compensation in damages, is afforded. Assuming that due attention will be given to those cases in which an action will lie if the proper facts are established, it will next be important to point out some of the cases in which no action can be maintained, even in cases in which it is clear that one party has sustained damages from the acts or omissions of another.

To constitute an actionable tort, the general rule is, that there must be an actual or legal damage to the plaintiff, and a wrongful act by the defendant. But, notwithstanding this, one person may sustain a serious injury at the hands of another, as in the case of an inevitable accident (*Harvey v. Dunlop*, Hill & Denio, 193), or a lawful act done in a lawful manner, without any carelessness or negligence, in which cases there is no legal injury, and no tort which will sustain an action for damages. Again, a party in doing an act in necessary self-defense may injure another without being liable to an action, as where a lighted firework is thrown into a company and again thrown out in self-defense, when it falls against another, or explodes in his face and

Actions founded upon torts.

blinds him. *Scott v. Shepherd*, 3 Wils. 403 ; 2 W. Bla. 892. So if a person's lands are exposed to the inroads of the sea, he may erect proper sea-walls for the protection of his lands, without liability for any injury which his neighbor may sustain in consequence. *Rex v. Pagham, Com., etc.*, 8 B. & C. 360. One who owns a house commanding a fine sea view, may sell the house, and afterward build on his own land in such a manner as to shut out the sea view of such purchaser, and yet not be liable to an action. There may be other wrongs which do not cause such legal damages as to sustain an action, as where there is a slander by word of mouth, but the words do not convey an imputation of an indictable offense, if the injured party has not, in consequence, sustained some pecuniary loss, or been injured in his trade, occupation or profession. At common law the most unjust and public charge or imputation of a want of chastity on the part of a female is not actionable without proof of actual damages, though the rule is otherwise by statute in this State.

There are other cases in which the damage is too remote to give rise to a cause of action. The publication of a libel upon an opera singer, who was deterred from singing because of her fears of injury which might be done by some one influenced by the libel, but not on account of the publication of the libel itself, will not be sufficient to maintain an action by the manager against the author of the libel. *Ashley v. Harrison*, 1 Esp. 49. So, in an action for slander, when the defendant has uttered slanderous words in respect of the plaintiff, not imputing to him any indictable offense, and creating a cause of action only in case the utterance of the slander has caused actual legal damage to the plaintiff, and no such damage has accrued to the plaintiff directly from the utterance of the words, and they would have failed to produce any injurious consequences to the plaintiff, if they had not been repeated by another person, the injury resulting from the intervention of that other person cannot be visited upon the defendant. *Ward v. Weeks*, 7 Bing. 211 ; *Parkins v. Scott*, 1 H. & C. 153.

Competition in trade is not actionable. In such a case there is no wrong, for the act done is the mere exercise of an undoubted right which belongs to every member of society. So, if a fisherman fits out a boat with lines and nets, and goes to fish in the high seas, and another fisherman comes and fishes beside him, and with tempting baits, or other contrivances, draws away

Is there an existing right of action.

the fish from the lines and nets of the first comer, with a view of catching them himself, an injury may be done; but there is no tort or wrong, for the one had as much right to fish, and to use fair and reasonable means to catch fish, as the other; but if the rival fisherman lays hold of the nets of the first comer, or violently disturbs the water and drives away the fish, and prevents the latter by force or violence from exercising his occupation or calling, there is then a wrong done to him, and he is entitled to compensation in damages. *Young v. Hichens*, 6 Q. B. 606.

Where the negligence of the plaintiff contributed to bring about the injury complained of, he will, as a general rule, be remediless, and upon this point the cases are very numerous. But in this connection it should be noticed that contributory negligence on the part of the plaintiff may not prevent his action, unless his acts were such that but for them the injury could not have happened; or, if it appear that the defendant might have avoided the consequences of the plaintiff's neglect or carelessness, by the exercise of due care on his own part. See the cases 2 Wait's Dig. 1087 to 1091.

An action will lie for a continuing tortious act, which injuriously affects the property of another although no appreciable damage results from it. *Delaware & Hudson Canal Co. v. Torrey*, 33 Penn. St. (9 Cas.) 143; see, also, *Thomas v. Brackney*, 17 Barb. 654; *Carhart v. Auburn Gaslight Co.*, 22 id. 297; *Honsee v. Hammond*, 39 id. 89; *O' Riley v. McChesney*, 3 Lans. 278.

Section 7. Is there an existing right of action. A full and careful examination of a case may show clearly that there was once a good cause of action; but, as there are many ways in which such right of action may be suspended, impaired, or destroyed, it is always proper to consider how far the case in hand has been thus affected, and whether there is a present perfect right of action.

When all the facts alleged in the complaint are conceded to be true, but they are not sufficient to constitute a cause of action, the occurrence of a material fact after the service of the summons cannot be incorporated in the complaint, and will not be of any avail in maintaining the action, because the right of action must be complete before the action is brought. *McCullough v. Colby*, 4 Bosw. 603; 5 id. 477; *Wattson v. Thibou*, 17 Abb. 184; *Buchanan v. Comstock*, 57 Barb. 582; *Hare v. Van Deusen*, 32 id. 92; *Oothout v. Ballard*, 41 id. 33; *Smith v. Aylesworth*, 40

Is there an existing right of action.

id. 104 ; *Castrique v. Bernabo*, 6 Q. B. 498 ; *King v. Accumulative Assurance Co.*, 3 C. B. N. S. 151.

As there are many important matters which require due consideration before bringing an action, it may be convenient to refer to some of them.

First. Where there has once been a good cause of action, it is well to inquire whether it has been relinquished or forfeited by any act or omission of the party entitled to it, as by laches, lapse of time or otherwise.

Secondly. If the cause of action arises on contract, has the plaintiff performed all such terms or conditions of it as the law requires of him before the other party can be put in default ?

Thirdly. Are there any acts which ought to be done by the complaining party before his right of action is complete ; such as making a request or demand upon the opposite party, giving notice of some matter or thing of which he is entitled to notice, or offering to do some act or perform some condition ? .

Fourthly. Has the performance of the contract become illegal by act or operation of law ; or has it become impossible by any acts or events which will legally excuse the performance by the defendant ?

Fifthly. Has the defendant done any thing which will relieve him from the liability to an action, such as making a tender before suit brought, or offering judgment, paying the demand, or offering to liquidate damages, so that he will be relieved from the costs of the action even though the plaintiff has a verdict ?

Sixthly. Has the right of action, if once perfect, been in any manner destroyed or barred, as by a release, an accord and satisfaction, an arbitrament and award, or been discharged by operation of law, or the like ?

Seventhly. Has the right of action been suspended, as by taking a negotiable security which is not due ; by a valid extension of the time of performance which has not expired ; or by any valid agreement which prevents an immediate action ?

Eighthly. Has the plaintiff recovered a judgment in a case in which he seeks a remedy founded upon such recovery, or has he been defeated in an action so as to entitle him to recover the consequent loss from the defendant ; or has a right of action been established at law in those cases, in which such a recovery is necessary before an equitable remedy is given, as by injunction, etc. ?

Ninthly. Where the cause of action arose upon contract, how far will an action be affected by a discharge or other proceeding under a bankrupt or insolvent law?

Tenthly. Is either party under any legal disability, such as infancy, coverture, lunacy, alienage or the like; and if so, what steps are necessary to be taken so that the remedy shall be legally pursued?

Eleventhly. Is the claim or demand barred by the statute of limitations; and if it has been, is the demand renewed by a written promise, by a valid part payment or the like?

From these general suggestions it will be seen that the plaintiff must examine the law carefully as to his original right of action, and, in addition, must, as far as possible, anticipate every ground of defense which is likely to be interposed.

Section 8. Cumulative or exclusive remedies by action. A statute which provides that a penalty imposed by it may be recovered by a summary proceeding upon complaint before two or more justices, does not bar the party from his remedy by action. *Collinson v. Newcastle & Darlington Railway Co.*, 1 Car. & Kir. 546; *Lichfield v. Simpson*, 8 Q. B. 65. But where a pecuniary obligation is created by a statute, and a remedy expressly given for enforcing it, that remedy must be adopted. *St. Pancras (Vestry) v. Battenbury*, 2 C. B. N. S. 477; *Dudley v. Mayhew*, 3 Comst. 9; *First National Bank of Whitehall v. Lamb*, 57 Barb. 434. Where a statute authorizes a corporation to forfeit the shares of stock of a subscriber for the non-payment of installments due upon a stock subscription, an exercise of the right of forfeiture on the part of the corporation will bar any subsequent action for such installments. *Small v. Herkimer Manufacturing Co.*, 2 Comst. 330; *Mills v. Stewart*, 41 N. Y. (2 Hand) 384.

Section 9. Illegality of ground of action. No principle of law is better settled than that which declares that an action cannot be maintained upon any ground or cause which the law declares to be illegal. *Davidson v. Lanier*, 4 Wall. 447; *Rolfe v. Delmar*, 7 Rob. 80; *Stewartson v. Lothrop*, 12 Gray, 52; *Howard v. Harris*, 8 Allen, 297; *Pearce v. Brooks*, L. R., 1 Exch. 213; *Smith v. White*, L. R., 1 Eq. Cas. 626.

CHAPTER V.

JURISDICTION OF ACTIONS.

ARTICLE I.

IN GENERAL.

Section 1. Definition and incidents. Jurisdiction is that power which the law confers upon courts, judges or other judicial officers to take cognizance of actions or proceedings, and to decide them according to law, and to carry their decision, decree or judgment into execution. The tract of land over which such jurisdiction is exercised is called the territorial jurisdiction. Jurisdiction is original, when it is conferred on the court or officers in the first instance. It is appellate, when an appeal may be taken from the decision or judgment of another court. It is concurrent, when it may be entertained by several courts; although it is a rule, in these cases of concurrent jurisdiction, that the court which is first seized of the cause shall try it to the exclusion of the other. It is exclusive, when only one court has the right to try the suit, action, or matter in dispute. Assistant jurisdiction is that which is afforded by a court of chancery in aid of a court of law, as, for example, by a bill of discovery.

A court which takes cognizance of an action, and proceeds in it, decides in effect that it has jurisdiction, although such decision may not be announced in express terms. *Clary v. Hoagland*, 6 Cal. 685. And where a court has the parties before it, it must necessarily obtain jurisdiction so far as to decide whether it can entertain the suit or proceeding, that is, whether it has jurisdiction of the action. *King v. Poole*, 36 Barb. 242. See *Cumberland Coal & Iron Co. v. Hoffman Steam Coal Co.*, 39 Barb. 16; 15 Abb. 78; *Humiston v. Ballard*, 40 How. 40.

Where jurisdiction is conferred in general terms, or for general or special purposes, the grant of such jurisdiction will carry with it all such legal incidents as are necessary and proper to secure the exercise of the authority. *Stief v. Hart*, 1 Comst.

Nature and origin.

20; *Robbins v. Gorham*, 25 N. Y. (11 Smith) 588, 594; *Voorhees v. Martin*, 12 Barb. 508.

Where a court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it acts without authority, its judgments and orders are regarded as nullities; they are not voidable but simply void. *People v. Sturtevant*, 9 N. Y. (5 Seld.) 263, 266; *Wilcox v. Jackson*, 13 Peters, 511.

ARTICLE II.

COMMON-LAW JURISDICTION.

Section 1. Nature and origin. The origin of courts has been elsewhere sufficiently explained. And, in relation to the authority exercised by courts generally, but few remarks are required. In the creation of courts and in the delegation of judicial authority to them, it is impossible to enumerate all the instances in which such authority may be exercised. And when general rules of law have been established for the determination of the rights of person and of property, and general rules of practice have been adopted, it is left to the court by the aid of these rules of law and of practice to determine what cases are, and what not, within the jurisdiction of the court to which such case is submitted. And, in a vast number of the causes which have been decided by the courts, no other authority for their trial is to be found, except that conferred by the principles of the common law, or of those of courts of equity. In all such cases, where courts hear and determine those matters which are within the reason of the rule which organized them and gave them authority, it is an invaluable part of their powers that they may act without being required to point out a specific, express grant of power in the particular case; for if this could be exacted of them, the result would be to deprive them of a large share of the authority which they have exercised from time out of mind, and, by general consent, with the greatest advantage to society at large. If any one desires to know how extensively this practice has prevailed, let him briefly trace the source of those powers which are daily exercised by our supreme court in actions at law, or in suits in equity.

In general.

ARTICLE III.

CONSTITUTIONAL AND STATUTORY JURISDICTION.

Section 1. In general. The jurisdiction of each of the superior courts has been pointed out in the particular chapters devoted to that purpose. That our higher courts were always similar to those of the English superior courts, and in the main founded upon them, is well known. And, since the establishment of our State government, the rule has been the same, as the English common law was adopted as a part of our system of laws. The jurisdictions of the supreme court, and of the court of chancery have never been distinctly pointed out, either in the constitutions or the statutes of this State. The first constitution treats these courts as existing, and mentions the chancellor and the judges of the supreme court, but does not declare or define the jurisdiction of these courts. Const. of 1777, article 16. By the constitution of 1822, article 7, section 13, the English common law was adopted. By article 7, sections 3, 4, 5, 6 and 7, provision is made in relation to the judges and chancellor, but their jurisdiction is not there defined. The constitution of 1846, article 7, section 3, provides for a supreme court, having general jurisdiction in law and equity. The judiciary act of 1847, chapter 280, section 16, declares that the supreme court shall possess the same powers and exercise the same jurisdiction as had formerly been possessed by the supreme court and the court of chancery.

By the Code of Procedure, section 10, the same jurisdiction is continued. The present constitution, article 6, section 6, continues the existing jurisdiction, and chapter 408 of Laws of 1870 provides for carrying the provisions of this constitution into effect.

From this brief review, it is readily seen that the civil jurisdiction of the supreme court extends to all actions or suits which are within the jurisdiction of the English courts of queen's bench, common pleas, exchequer, or the court of chancery. There are statutes which expressly confer or define the jurisdiction of the supreme court in specified cases. But, as a whole system, there are no constitutional or statutory provisions which clearly and explicitly declare or define the precise limits of the jurisdiction of this court in all cases, except in so far as a

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general reference of the character adopted may be said to be certain, since it refers to a system which is substantially well defined. The supreme court, as now organized, may be considered as possessing jurisdiction over all cases of a legal or equitable nature, and as competent to secure every right and to give every remedy or relief which the law guarantees to any person. There are a few exceptions to this general rule, but they need not be here specified.

ARTICLE IV.

JURISDICTION OF STATE COURTS.

Section 1. In general. Under a government like that of the United States, where there are several large States, and each possessing an extensive as well as exclusive jurisdiction within its limits, it may be laid down as a general rule that the jurisdiction of each State does not extend beyond its territorial limits, and that within such limits its jurisdiction is exclusive. In relation to the United States courts there are exceptions to this general rule. So, too, the judgments of each State are entitled to respect and the aid of other States in carrying them into effect in such States when necessary. In most cases, a party who seeks a remedy against a resident of a particular State, or against his property situated within it, must apply to the courts of that State for the relief sought. The particular instances in which State courts have or have not jurisdiction, in such cases, will be pointed out in the proper places.

ARTICLE V.

SUPERIOR AND INFERIOR COURTS.

Section 1. In general. Those courts which have general jurisdiction in law or equity cases are usually termed superior courts, while those which have but a limited jurisdiction as to subject-matter, locality or persons, are called inferior courts. The proceedings of an inferior court may be as regular and its judgment as conclusive as those of a superior court. But the mode of establishing that fact is not always the same. A court of general or superior jurisdiction is presumed to have acted

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within its jurisdiction, and this presumption continues until the contrary is shown. The record of the proceedings of a superior court need not show affirmatively that it had jurisdiction, so far as the authority to act is concerned, when the question arises collaterally, but it is otherwise when the question arises by way of review for the correction of errors, and the question has been properly raised in due time. Limited or inferior courts have no jurisdiction except that specially conferred, or such incidental powers as may be included in the general delegation of the authority. And in such cases the records of their proceedings ought to show affirmatively on their face that the court had jurisdiction, except in those cases which permit extrinsic evidence for the purpose of establishing that fact. 2 Wait's Law and Pract. 21.

ARTICLE VI.

EXCLUSIVE OR CONCURRENT JURISDICTION.

Section 1. In general. The jurisdiction of any court is exclusive, when no other court can exercise the same powers in relation to the action. In some cases the United States courts have exclusive jurisdiction, and the State courts have no authority to act in the matter. So, too, in reference to the several courts in a State, there may be an exclusive jurisdiction conferred upon one court to the exclusion of the other courts of the same State. The distinction between the powers of the superior and the inferior courts illustrate this point. Again, in those States in which courts of law and courts of equity are separate organizations, there are numerous instances in which each court has exclusive jurisdiction. This subject, however, is less important here, since the powers of the two courts are now exercised by the supreme court.

The jurisdiction of courts is concurrent, when each of several different courts has the same right to act in relation to its subject-matter, or as to the persons of the parties. There are many cases in which there is a concurrent jurisdiction in most respects, while there are few cases in which the powers of the court are identical. Within certain limits as to amount, and as to the locality of the parties, when an action for the recovery of money has been brought in a justices' court, it may be said to have

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exercised a jurisdiction concurrent with that of the supreme court as to the recovery of that amount. But, the most that can be properly said is, that the inferior court has a limited concurrent jurisdiction. There are also courts of record, such as the county courts, and other courts of record of cities, which exercise a jurisdiction concurrent in some respects with that possessed by the supreme court. But, in all such cases, while the inferior courts possess a limited concurrent jurisdiction in some respects, it cannot be said of any of them that their jurisdiction is in any other respect concurrent with that of the supreme court. There may be a concurrent jurisdiction as to some remedies, while in all other respects the jurisdiction is in no sense concurrent.

ARTICLE VII.

JURISDICTION OF SUBJECT-MATTER.

Section 1. In general. In actions in the supreme court there can seldom be any question as to the jurisdiction over the subject-matter of the action, since this court has general jurisdiction at law and in equity. But even this court is sometimes without authority to act, as in the case of an action to restrain the infringement of a patent right. *Dudley v. Mayhew*, 3 N. Y. (3 Comst.) 9. If the law does not confer jurisdiction over the subject-matter of the action, no consent given by the parties will be of any avail, even though there should be an express agreement not to raise the question. *Ib.* And the objection may be interposed at any time, since in that case there can be no waiver of it; but the judgment will be held entirely void at all times and in all places. See the cases cited in Wait's Code, 24, 25, 26.

Courts cannot be deprived of their jurisdiction by any agreement of the parties, as by an agreement that matters of difference arising out of a specified contract shall be submitted to arbitration. *Hart v. Lauman*, 29 Barb. 411; *Haggart v. Morgan*, 5 N. Y. (1 Seld.) 422. See 1 Wait's Law and Prac. 1013.

Nor can they by consent confer jurisdiction over the subject-matter of actions, where none is given by law. *Dudley v. Mayhew*, 3 N. Y. (3 Comst.) 9; *Beach v. Nixon*, 9 N. Y. (5 Seld.) 36; 2 Wait's Law and Prac. 15; *Avards v. Rhodes*, 8 Exch. 312; *Lawrence v. Wilcock*, 11 Ad. & E. 941; *Vansittart v. Taylor*, 4 E. & B. 910, 912.

ARTICLE VIII.

JURISDICTION OF THE PERSON.

Section 1. In general. Before any court can acquire jurisdiction over the person of the defendant, there must be some steps taken to bring him into the court. 2 Wait's Law and Prac. 11 to 15. No one can be lawfully condemned before he has had an opportunity of being heard. There is a material difference, however, between this case and that relating to the subject-matter of the action. In the latter case we have seen that consent cannot confer jurisdiction. But a defendant may waive an irregularity in the mode of bringing him into court, or he may appear and give jurisdiction over his person by consent. 2 Wait's Law and Prac. 17 to 20. Such waiver may be express, or it may be implied from his acts, by taking subsequent steps in the action without objection to the previous irregular or void proceedings. But for all practical purposes, a single remark is sufficient, as every careful practitioner will be certain to proceed in such a manner that no valid objection can be made in relation to the regularity of the steps by which the defendant has been proceeded against for the purpose of obtaining jurisdiction over his person or property.

It may be well to mention here that in case the defendant is absent from the State, or is a non-resident, there may, in a proper case, be proceedings against his property found in this State.

ARTICLE IX.

DISQUALIFICATIONS OF JUDGES.

Section 1. In general. The law declares, in some cases, that a judge cannot sit as such on account of some matter personal to himself. Relationship to either of the parties is an instance of this kind. 2 R. S. 275, § 2. So of an interest in the cause of action, or where he is a party to the action. *Ib.* If he decided the cause in the court below, or took part in the decision, he cannot sit in the appellate court, in review of such decision. *Ib.* § 3. Const., art. 6, § 8. See, also, *Real v. People*, 42 N. Y. (3 Hand) 270; 8 Abb. N. S. 314.

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Where a judge is disqualified to sit in a cause, by reason of consanguinity to one of the parties, he cannot sit, even by consent of both parties, and if he does, the judgment will be vacated. *Oakley v. Aspinwall*, 3 N. Y. (3 Comst.) 547. See 2 Wait's Law and Prac. 21 to 28.

ARTICLE X.

JURISDICTION IN SPECIAL CASES.

Section 1. In general. There are numerous cases of actions and special proceedings in which jurisdiction is expressly conferred by statute. Many of these cases are noticed in that part of this work which treats of the jurisdiction of the supreme court.

ARTICLE XI.

RAISING OR WAIVING OBJECTION.

Section 1. In general. Where the court has no jurisdiction over the subject-matter of the action, an objection may be taken at any time ; but, where the objection relates to the person of the defendant, he may waive any irregularity in the mode of bringing him into court ; and, when once waived, the jurisdiction of the court over his person will be complete. Such waiver may be express or implied, and if the defendant proceeds in the action by pleading, or taking other steps therein, his conduct will amount to a waiver of all objections of that kind ; and, if a party would avail himself of such objections, he must act promptly in raising them, and be careful not to waive them by any subsequent acts on his part. See 2 Wait's Law and Prac. 19, 20.

CHAPTER VI.

TIME OF COMMENCING ACTIONS.

ARTICLE I.

OBJECT OF LIMITING THE TIME OF COMMENCING ACTIONS.

Section 1. In general. The necessity of limiting the time within which an action may be brought, arises from the inconveniences and uncertainty attendant upon the legal and equitable adjustment of rights, betwixt parties, in cases where claims have become stale, and titles have long remained open. It is the policy of the law to discourage litigations, and in furtherance of this policy it requires a creditor to bring his action within a reasonable and prescribed period or to take the risk of losing his demand ; for, an unlimited permission to litigate claims of long standing would forever open the door for frauds and perjuries. Besides which, general policy requires for the sake of mankind at large, that the person who has long enjoyed, and who has the credit attributed to long enjoyment, should not be lightly disturbed. Lord Eldon, *Hayes*, Introd. 1, 223 : The age of a claim is always a proper element for consideration in determining whether it is a legal, subsisting obligation. A creditor usually demands, and a debtor generally pays, a valid debt, and any other conduct is exceptional, and creditors rarely neglect to enforce the payment of debts which can be collected. If claims are permitted to run a very long time without enforcement or demand of payment, the law will presume their payment or extinction in some legal manner. It is not important to notice the common-law rule as to the time when this presumption attached, as there has long been a statute defining and declaring the times for barring actions upon demands.

This statute is considered one of repose, and not of presumption. If it were a mere statutory presumption of payment, then any act which rebutted this presumption would continue or revive the debt ; but, if considered to be a statute of repose, then the debt cannot be revived except by a voluntary new promise or some equivalent act.

Section 2. No limitations as to time of commencing actions at common law. At common law, there was no fixed or stated time within which an action must be brought, although after a great lapse of time the claim or demand might be presumed to have been paid or satisfied. Limitations are now created by and derive their authority from statute. *The People v. Gilbert*, 18 Johns. 228; *Wilcox v. Fitch*, 20 id. 472; *People v. Herkimer*, 4 Cow. 345; *United States v. White*, 2 Hill, 59; *Receivership of Columbian Marine Insurance Co.*, 3 Keyes, 123, 125. The people, however, are not bound by the statute unless expressly named. *Ib.* The English statute of limitations, 21 Jac. I, ch. 16, with many modifications, has been generally re-enacted in the States of the Union in which the principles of the common law prevail, and forms the basis of most of the existing provisions on the subject in the several States. Such was the case in this State until the adoption of the Code in 1848.

Section 3. How far the Code repealed existing statutes of limitation: Where right of action accrued since adoption of Code. All statutes relating to the limitation of actions, existing at the adoption of the Code, were repealed by that instrument, except so far as they related to "actions already commenced, or where the right of action had already accrued," and in their stead were substituted the provisions to be found under Title II of the Code. See Code, § 73.

Section 4. Where right of action accrued before adoption. The provisions of the above *title*, however, did not extend to "actions already commenced or where the right of action had already accrued," the statutes then in force being applicable in all such cases, according to the subject of the action, and without regard to the form. Code, § 73. Where the cause of action accrued before the enactment of the Code, no new promise in writing is necessary; and any new promise which would have been valid under the former statute will be equally valid under the Code. *Van Alen v. Felts*, 1 Keyes, 332; *Coe v. Mason*, 41 Barb. 612; *Lansing v. Blair*, 43 N. Y. (4 Hand) 48.

Section 5. Where different limitation is prescribed by statute. In addition to the provisions of the Code, relating to limitation of actions embraced under Title II, there are a few other special statutory provisions, which will hereafter be noticed more fully.

Section 6. When the statute commences to run. The time within which an action may be brought, commences to run "after the

Plaintiff under disability — Defendant out of State.

cause of action shall have accrued" (Code, § 74), but the day on which the right of action accrues is to be excluded in computing time within which an action is to be commenced. *Cornell v. Moulton*, 3 Denio, 12; *McGraw v. Walker*, 2 Hilt. 404; *Smith v. Aylesworth*, 40 Barb. 104; *Oothout v. Ballard*, 41 id. 33; *Etheridge v. Ladd*, 44 id. 73; *Hodge v. Ade*, 2 Lans. 314.

Section 7. Where plaintiff is under a disability. If a person entitled to commence an action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents or services out of the same, be at the time such title shall first descend or accrue, either within the age of twenty-one years, or insane, or imprisoned on a criminal charge, or in execution upon conviction of a criminal offense for a term less than for life, the time during which such disability shall continue shall not be deemed any portion of the time limited for the commencement of such action, or the making of such entry or defense; but such action may be commenced, or entry or defense made, after the period of twenty years, and within ten years after the disability shall cease, or after the death of the person entitled, who shall die under such disability; but such action shall not be commenced, or entry or defense made, after that period. Code, § 88.

The disability must exist when the right of action accrued; and where two or more disabilities co-exist at the time the right of action accrues, the limitation shall not attach until they all be removed. Code, §§ 106, 107. The statute of limitations does not commence to run against an infant *cestui.que trust*, although her right to foreclose a mortgage accrues to her more than ten years before she becomes of age. *Bucklin v. Bucklin*, 1 Keyes, 141.

Section 8. Where defendant is absent from State. The operation of the provisions of the statute for the limitation of actions is suspended in case the defendant be absent from the State when the cause of action accrued, or in case he depart from and take up his residence out of the State after the right of action shall have accrued, or remain continuously absent therefrom for the space of one year or more. Code, § 100.

The provision that the statute shall not run, in case the defendant be absent when the cause of action accrued, is equally applicable to non-residents as to citizens going out of the State. *Car-penter v. Wells*, 21 Barb. 593; *Power v. Hathaway*, 43 id. 214.

Where action abates by death of party.

A foreign corporation is a person out of the State within section 100, and cannot plead the statute. *Olcott v. The Tioga Railroad Co.*, 20 N. Y. (6 Smith) 210; reversing S. C., 26 Barb. 147; *Dart v. Farmers' Bank at Bridgeport*, 27 id. 337; *Mallory v. Tioga Railroad Co.*, 3 Keyes, 354; S. C., 1 Trans. App. 203; 5 Abb. N. S. 420; 36 How. 202. So far as the above provision of the statute relates to residence, a liberal construction has been given. A change of domicile is not necessary to constitute a party a non-resident; a material absence, as contra-distinguished from a temporary departure and speedy return, is sufficient. *Harden v. Palmer*, 2 E. D. Smith, 172; *Gans v. Frank*, 36 Barb. 320. The statute extends to non-residents as well as to residents who depart from and reside out of the State. *Ford v. Babcock*, 2 Sandf. 518; 7 N. Y. Leg. Obs. 270.

The operation of the statute is suspended as to a joint debtor during the time he is absent from the State, although his co-debtor has remained within the State. *Denny v. Smith*, 18 N. Y. (4 Smith) 567; *Cutler v. Wright*, 22 id. (8 Smith) 472, 477; *White's Bank of Buffalo v. Ward*, 35 Barb. 637. The rule is the same in the case of one of two joint and several debtors. *Bogert v. Vermilya*, 10 N. Y. (6 Seld.) 447. See 10 Barb. 32; 1 Code R. N. S. 212.

Section 9. Where action abates by death of party. On the death of a party entitled to bring an action, where the cause of action survives, the time within which the action may be brought by his representatives, is extended for the term of one year from the death of the party, in addition to the time limited by the statute. Code, § 102. It is further provided by the above section, that, "if a person, against whom an action may be brought, die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his executors or administrator after the expiration of that time, and within one year after the issuing of letters testamentary, or of administration."

The provision of the Revised Statutes (2 R. S. 448, § 8), that the term of eighteen months after the death of any testator or intestate shall not be deemed any part of the time limited by law for the commencement of an action against his executors or administrators, remains in full force and effect, notwithstanding the provisions of the above section of the Code. *Scovil v. Scovil*, 45 Barb. 517; S. C., 30 How. 246. See *Penny v. Brice*, 18 C. B. N.

 Death of party — Where action stayed — Fraud.

S. 393. In case of the death of a debtor while residing out of the State, if he was so absent at the time the cause of action accrued, the statute commences running only from the time of granting letters of administration in this State. *Davis v. Garr*, 6 N.Y. (2 Seld.) 124; *Olcott v. Tioga Railroad Co.*, 20 N.Y. (6 Smith) 210, 225; *post*, 61, § 15, *a*.

But where a resident of this State, indebted by simple contract, goes out of the State after such debt becomes due, and dies before returning thereto, the statute will be a bar to an action against his administrator, after six years from the time when the debt became due, excluding the time from the departure of the debtor from the State, until eighteen months after his death. *Christophers v. Garr*, 6 N.Y. (2 Seld.) 61.

Where one obtains any property of a deceased person the statute commences to run from the granting of letters of administration, and not from the time of the receipt of the property. *Bucklin v. Ford*, 5 Barb. 393.

Section 10. Where action has been stayed. When the commencement of an action shall be stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition shall not be part of the time limited for the commencement of the action. Code, § 105.

Under the provisions of this section, a plaintiff need not plead specially that an injunction has been served on him. It is sufficient if he had notice of it. *Berrien v. Wright*, 26 Barb. 208.

The time during which an injunction is operative must be deducted when the statute of limitations is interposed as a defense. *Sands v. Campbell*, 31 N. Y. (4 Tiff.) 345.

Where an injunction does not prevent a party from bringing an action to enforce his rights, the fact that the injunction restrained him from doing other acts will not prevent the statute from becoming a bar. *McQueen v. Babcock*, 41 Barb. 237; S. C. affirmed, 33 How. 617(*n*).

Section 11. In actions based on fraud. In "an action for relief on the ground of fraud, in cases which were heretofore solely cognizable by the court of chancery," the operation of the statute will be suspended, "until the discovery by the aggrieved party of the facts constituting the fraud." Code, § 91, subd. 6; *Gates v. Andrews*, 37 N. Y. (10 Tiff.) 657; S. C., 5 Trans. App. 176.

In suits by aliens — Officers of corporations.

But the Code restricts the rule to cases solely cognizable in equity, and if the fraud is such that the party has a concurrent remedy at law or in equity, the action must be commenced within six years from the commission of the fraud, irrespective of the question when the fraud was discovered by the injured party. *Foote v. Farrington*, 41 N. Y. (2 Hand) 164. See *Mayne v. Griswold*, 3 Sandf. 463 ; 9 N. Y. Leg. Obs. 25.

Section 12. In suits by aliens. The operation of the statute is not suspended in favor of an alien subject or citizen of a country at war with the United States, during the continuance of the war. Code, § 103.

A citizen of another State who is engaged in war with the United States, is such an enemy as to be without remedy in our courts until hostilities are ended. His claim may then be revived and recovered. *Bonneau v. Dinsmore*, 23 How. 397 ; *Sanderson v. Morgan*, 39 N. Y. (12 Tiff.) 231. The time during which the courts were closed by the civil war in the rebellious States is to be excluded from computation. *Hanger v. Abbott*, 6 Wall. 532 ; *United States v. Wiley*, 11 id. 508.

Section 13. Actions against officers of corporations. Actions against officers of corporations to recover a penalty or forfeiture imposed, or to enforce a liability created by law, are not affected by the provisions of the Code under Title II, but all such actions must be brought within six years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created. Code, § 109.

ARTICLE II.

ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

Section 1. When the people will not sue. The people of the State will not sue in respect to any right or title to real property that shall not have accrued within forty years before any action or other proceeding for the same shall be commenced, or unless the people, or those from whom they claim, shall have received the rents and profits of such real property, or of some part thereof, within the space of forty years. Code, § 75.

Under this provision of the Code it has been held, that an action by the people to recover lands is not barred by the statute of limitations, unless it be shown that there has been an adverse

When action cannot be brought by grantee of State.

possession of forty years before the commencement of the suit. And the people, it seems, are deemed to have received the rents and profits so as to prevent the running of the statutes, unless the lands are held in hostility to their title, even though the lands be wild and uncultivated. *People v. Arnold*, 4 N. Y. (4 Comst.) 508; *People v. Rector, etc., of Trinity Church*, 22 id. (8 Smith) 44.

Section 2. When action cannot be brought by grantee of State. No action can be brought by a grantee of the State, unless the same might have been commenced by the people, in case such patent or grant had not been issued or made. Code, § 76.

Section 3. Actions against grantee of void grant. Actions against a grantee of a void grant may be brought by the people of the State, or by their subsequent grantee of the same premises, within twenty years after the said grant shall be declared void by a competent court, but not after that period. Code, § 77.

Section 4. Seisin within twenty years, when necessary; in action for recovery of real property. In an action for the recovery of real property it must appear, under section 78 of the Code, that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question within twenty years before the commencement of such action.

Section 5. In actions or defenses founded upon title to or rents of real property. In actions or defenses founded upon title to or rents of real property, the person prosecuting the action or making the defense must show that the ancestor, predecessor or grantor of such person was seized or possessed of the premises in question within twenty years before the committing of the act, in respect to which such action is prosecuted or defense made. Code, § 79.

A party bringing an action or making a defense founded upon the title to real property, or his ancestor, etc., must have had such a seisin or possession as carries with it the title to the premises, or a right of entry which will authorize an action of ejectment. *Tyler v. Heidorn*, 46 Barb. 439; *Lyon v. Chase*, 51 id. 13, 15; *Van Rensselaer v. Vickery*, 3 Lans. 57.

Section 6. Entry or right of entry. No entry upon real estate shall be deemed sufficient or valid as a claim, unless an action be commenced thereupon within one year after the making of such entry, and within twenty years from the time when the right to make such entry descended or accrued. Code, § 80.

ARTICLE III.

ACTIONS OTHER THAN THOSE FOR THE RECOVERY OF REAL PROPERTY.

Section 1. Action upon a judgment or decree. The period prescribed by the Code within which an action may be brought upon a judgment or decree of any court of the United States, or within any State or Territory within the United States, is twenty years. Code, § 90. The above section includes judgments in the marine and justices' courts. *Conger v. Vandewater*, 1 Abb. N. S. 126; *Delavan v. Florence*, 9 Abb. 277, note. It also includes the decrees of a surrogate. *Paff v. Kinney*, 1 Bradf. (Sur. R.) 4. After the lapse of twenty years from the docketing of a judgment it can be revived only in the manner prescribed by statute. It is not competent for the parties to revive it by an order entered on a stipulation by consent. *Thompson v. Jenks*, 2 Abb. N. S. 229. The presumption of the payment of a judgment obtained before the Revised Statutes took effect, may be rebutted by showing a sheriff's return of an execution partly unsatisfied. *Henderson v. Cairns*, 14 Barb. 15. See, also, *Waddell's Administrator v. Elmendorf's Administrator*, 10 N. Y. (6 Seld.) 170.

Section 2. Action upon a sealed instrument. An action upon a sealed instrument, such as a bond, etc., must be brought within twenty years. Code, § 90. This rule applies only where the cause of action arises out of a breach of the conditions of the instrument under seal, and not where such instrument merely transfers a right of action on a totally distinct and independent agreement, express or implied, and where the breach of such latter agreement gives the right of action. Thus, where an action was brought to recover the price of property conveyed at an implied valuation, the action was held to be barred by the statute after the lapse of six years, though the assignment of the grant was by instrument under seal. *Coleman v. Second Avenue Railroad Co.*, 48 Barb. 371; affirmed, 38 N. Y. (11 Tiff.) 201; S. C., 6 Trans. App. 146; 35 How. 643 (*n.*)

Section 3. What actions must be brought within six years; action upon contract, obligation or liability. Under this head are included all those numerous cases in which actions may be brought upon contract, obligation or liability, express or implied, excepting sealed instruments, and the time within which they may be

Six years — Action upon liability created by statute.

brought is limited to six years. Code, § 91, subd. 1. A debt, in the form of a note, secured by a mortgage, is affected by two different statutes of limitation. An action upon the note may be barred by the statute of limitations while the remedy upon the mortgage remains unimpaired. *Pratt v. Huggins*, 29 Barb. 277; *Heyer v. Pruyn*, 7 Paige, 465; *Thayer v. Mann*, 19 Pick. 535; *Baldwin v. Norton*, 2 Conn. 163; *Wiswell v. Baxter*, 20 Wis. 680; *Elkin v. Edwards*, 8 Ga. 325.

In a suit against prior indorsers, by an indorser, compelled to pay the amount of a note, the six years will run from the payment of the money, and not from the time when the note fell due. *Barker v. Cassidy*, 16 Barb. 177. The remedy of the payee, against the maker of a note, under similar circumstances, is upon the note itself, and hence the above rule will not apply. *Woodruff v. Moore*, 8 Barb. 171. Where credit is given on a sale of goods, the statute begins to run from the expiration of that credit. *Harden v. Palmer*, 2 E. D. Smith, 172.

The statute commences to run against the claim of an attorney for professional services, and for disbursements, whenever his services are so brought to an end, that an action may be maintained for them. *Adams v. The Fort Plain Bank*, 36 N. Y. (9 Tiff.) 255; S. C., 2 Trans. App. 234; reversing S. C., 23 How. 45.

But an attorney engaged upon a general retainer in the same matter may allow a portion of his disbursements or charges to overrun the six years without peril from the statute. *Mygatt v. Willcox*, 1 Lans. 55.

Where services in the management of a farm are performed for a series of years, without any express agreement as to the time or measure of compensation, no payments being made, the law, for the purpose of determining when the statute begins to run, will not imply an agreement that the payment shall be postponed until the termination of the employment, but will regard the hiring as from year to year, and the wages as payable at the same time. *Davis v. Gorton*, 16 N. Y. (2 Smith) 255.

The maker of a promissory note cannot recover back choses in action pledged by him as security for its payment, simply because an action upon such note is barred by the statute of limitations. Nothing short of actual payment or a tender will enable him to do so. *Jones v. Merchants' Bank of Albany*, 6 Rob. 162.

Section 4. Action upon liability created by statute. An action

upon a liability created by statute, other than a penalty or forfeiture, must be brought within six years. Code, § 91, subd. 2.

A suit against a stockholder of a corporation, to charge him individually with a debt contracted by it, comes within the above provision. *Corning v. McCullough*, 1 N. Y. (1 Comst.) 47; *Conklin v. Furman*, 57 Barb. 484; 8 Abb. N. S. 161.

An action brought to charge a person as trustee of a corporation with the debt of the company, for a failure to file an annual report, pursuant to statute (Laws 1848, chapter 4), relating to manufacturing corporations, is an action for a penalty or forfeiture, and must be brought within three years. *Merchants' Bank of New Haven v. Bliss*, 1 Rob. 391; 35 N. Y. (8 Tiff.) 412. As to what acts subject to penalties in such cases, see *Dabney v. Stevens*, 40 How. 341; 10 Abb. N. S. 39; 2 Sweeny, 415; *Johnson v. Hudson River R. R. Co.*, id 298.

Section 5. Actions for trespass upon real property. Under the Code, section 91, subdivision 3, all actions for trespass upon real property must be brought within six years.

Section 6. Actions of trover and replevin. An action for taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property, must be brought within six years. Code, § 91, subd. 4. And the date of the commission of the injury or offense complained of, governs the statutory time. Thus in trover, when the inquiry is at what time the statute commences to run, reference is had to the time of the conversion, and never to the time of demand and refusal. *Kelsey v. Griswold*, 6 Barb. 436.

In an action against assessors for illegally assessing a tax upon the plaintiff, the statutory time will begin to run when his property is taken by the collector for sale to satisfy the tax, and not from the time of making the assessment. *Mygatt v. Washburn*, 15 N. Y. (1 Smith) 316; *Clark v. Norton*, 3 Lans. 484.

An action against an agent for neglect to pay over moneys collected by him must be brought within six years, and the statute begins to run from the date of the collection, no previous demand being necessary. *Hickok v. Hickok*, 13 Barb. 632. This rule does not apply where goods are left to be sold on commission. In such case the owner has no cause of action for the value of such goods until demand made, and till such demand the statute will not commence to run. *Baird v. Walker*, 12 Barb. 298; *Walden v. Crofts*, 2 Abb. 301; 4 E. D. Smith, 490.

Section 7. Actions for injury to the person or rights of another other than contract rights. An action for criminal conversation, or other injury affecting the person or rights of another, not arising on contract, must be brought within six years. This subdivision includes all torts or injuries not elsewhere specially noticed, and is very comprehensive in its scope. Code, § 91, subd. 5.

Section 8. Actions for relief on ground of fraud. The sixth subdivision of section 91 of the Code provides that "an action for relief on the ground of fraud, in cases which heretofore were solely cognizable by the court of chancery; the cause of action in such cases not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud, shall be brought within six years."

Under the Revised Statutes, a party had six years after discovery of a fraud upon him in which to bring his suit in equity although there was a concurrent remedy at law; but the above provision of the Code has restricted this rule, dating the time of limitation from the discovery of the fraud, to cases solely cognizable in equity, so that, if a party has a concurrent remedy at law, the action will be barred in six years from the commission of the fraud. *Foot v. Farrington*, 41 N. Y. (2 Hand) 164. See *ante*, 52, ch. 6, § 11.

Section 9. Actions for an accounting. Actions for accounting purely, in a case of mutual, open, and current accounts, where there have been reciprocal demands between the parties, and where, heretofore, a court of equity and a court of law would have had concurrent jurisdiction, must be brought within six years. *Borst v. Corey*, 15 N. Y. (1 Smith), 505; and the provision of section 95 of the Code, that "the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side" is applicable to all such cases. 2 Van. Sant. Eq. Pr. 170

Section 10. Action upon a current account. In an action to recover the balance due upon a mutual, open, and current account, the statute begins to run from the time of the last item proved in the account on either side, and the action must be brought within six years. Code, § 95; *Borst v. Corey*, 15 N. Y. (1 Smith) 505.

It is necessary, to constitute a mutual account, that there be items of account on both sides. *Hallock v. Losee*, 1 Sandf. 220.

What actions must be brought within three years.

To bring a case within the statute, the dealings must be direct and open between the parties. Thus, where a current account exists between parties, and one of them purchases from a third party an open account against the other without notice to or recognition of its validity by the latter, such purchased account does not become part of the current account, and is barred in six years from the time it accrued. *Green v. Ames*, 14 N. Y. (4 Kern.) 225.

Where payments are made upon work done under a special contract, such payments do not constitute items of reciprocal demands under this section. *Peck v. New York and Liverpool U. S. Mail Steamship Co.*, 5 Bosw. 226. Payment of all the items but one under such a contract, and a refusal to pay that item does not operate as such a payment as will prevent the running of the statute as to the other items. *Ib.*

Property delivered at one time upon an implied contract, where there is no express contract, entitles the vendor to sue for the value as soon as the delivery is made; but it is not a case of mutual accounts, and the demand will be barred in six years from the time when the right of action accrued. *Turner v. Martin*, 4 Rob. 661.

Section 11. What actions must be brought within three years.

a. Actions other than for an escape, against sheriff, coroner, or constable. An action against a coroner or constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, or against a sheriff, coroner, or constable, for the non-payment of money collected upon an execution, must be brought within three years. Code, § 92; Laws of 1871, ch. 733, § 2.

An omission to return an execution duly delivered for service is an omission of official duty, and a right of action accrues as soon as the time for such return expires. *Peck v. Hurlburt*, 46 Barb. 559.

A seizure and sale by a sheriff, of the property of a person, not the defendant in the execution, is an act in an official capacity. *Dennison v. Plumb*, 18 Barb. 89; *Cumming v. Brown*, 43 N. Y. (4 Hand) 514; *People v. Schuyler*, 4 Comst. 173; *Coddington v. Carnley*, 2 Hilt. 528.

A sheriff who is sued for not paying over money collected by him must show a clear defense for retaining it in his hands. *Davy v. Field*, 2 Keyes, 608.

What actions must be brought within two years—One year.

As to actions against *sheriffs*, see the important changes found under the limitation to one year. *Post*, § 13.

b. Action brought upon a statute for a penalty by the party aggrieved. An action upon a statute for a penalty, given to the party aggrieved, or to such party and the people of this State, except where the statute imposing it prescribes a different limitation, must be brought within three years after the cause of action accrued. Code, § 92, subd. 2; *The Merchants' Bank of New Haven v. Bliss*, 35 N. Y. (8 Tiff.) 412; 21 How. 365; 13 Abb. 225.

Section 12. What actions must be brought within two years:

a. Actions for libel, slander, etc. Actions for libel, slander, assault, battery, or false imprisonment must be brought within two years from the time the cause of action accrued. Code, § 93, subd. 1. An action to recover damages for causing the death of a person must be brought within two years. Laws 1870, ch. 78, § 2; Laws 1849, ch. 256.

b. Action for forfeiture or penalty to people of the State.

Actions upon a statute for a forfeiture or penalty to the people of this State, must be brought within two years. Code, § 93, subd. 2. The provision of the act of congress of 1841 (5 U. S. Stat. at Large, 446, § 8), limiting the assignee in bankruptcy to two years in which to bring his action for the recovery of real property held adversely to the bankrupt, only applies when the adverse claims existed while the property was in the hands of the bankrupt, and prior to the assignment; it does not apply to a cause of action arising in favor of such assignee after the assignment, for an injury to property or a disseisin of lands vested in him by the proceedings. *Stevens v. Hauser*, 39 N. Y. (12 Tiff.) 302; reversing S. C., 1 Rob. 50; 1 Abb. N. S. 391.

Section 13. What action must be brought within one year. An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process. Code, § 94.

A late statute has made a material change in the law relating to the limitation of actions against sheriffs, and it is now provided as follows: "No action shall be brought against any sheriff upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, not including the non-payment of money collected upon an execution, unless the same shall be commenced within one year from the time when the cause of action shall

What actions must be commenced within ten years.

have accrued." Laws of 1871, ch. 733, § 2. It will be observed that the right of action against a sheriff for the non-payment of money collected upon an execution is left under the three years' limitation of the Code, § 92, subd. 1.

"An action upon a statute for a penalty or forfeiture, given in whole or in part to any person who will prosecute for the same, must be commenced within one year after the commission of the offense, when the action is brought by a private party. Code, § 96, subd. 1. As to actions by attorney-general or district attorney, see Code, § 96.

Section 14. What actions must be commenced within ten years.

a. Equitable actions generally. All actions of an equitable nature, except those already noticed as coming within the six years' limitation (*ante*, ch. 3, art. 2, § 6), must be commenced within ten years after the cause of action shall have accrued. Code, § 97.

In actions to compel the specific performance of contracts the statute begins to run from the time when the plaintiff might have brought his action, and he is chargeable with notice that his right is denied. A new cause of action is not created by a subsequent demand. *Bruce v. Tilson*, 25 N. Y. (11 Smith) 194; *Roberts v. Sykes*, 8 Abb. 345; S. C., 30 Barb. 173.

The statute does not begin to run against a party in actual possession of property until actual eviction by the holder of the legal title, although his cause of action might have previously accrued. *Bartlett v. Judd*, 23 Barb. 262; 21 N. Y. (7 Smith) 200.

A suit for the enforcement of a mortgage, or a lien secured by deed (*Borst v. Corey*, 15 N. Y. [1 Smith] 505); a suit for the enforcement of a debt against the real estate of a testator in the hands of the devisee (*Elwood v. Deifendorf*, 5 Barb. 398); and an action for an account in respect of transactions between the cashier of a bank and the bank itself, with a view to ascertain the balance due and claimed by the plaintiff, as purchaser of all demands, at a judicial sale of the bank assets (*Mann v. Fairchild*, 14 Barb. 548), or a suit to redeem a real estate mortgage, are all equitable suits, and within the two years' limitation. *Miner v. Beekman*, 42 How. 33; 11 Abb. N. S. 147.

Section 15. Other statutory provisions.

a. Suits by or against persons in a representative capacity. The special statutory provisions relating to limitation of actions, in certain cases, will be briefly noticed in this article. By a

Other statutory provisions.

provision of the Revised Statutes (2 R. S. 448, § 8), "the term of eighteen months after the death of any testator or intestate shall not be deemed any part of the time limited by law for the commencement of an action against his executors or administrators." And by section 9 "the time between the death of such person, and the granting of letters testamentary or of administration, not exceeding six months, and also six months after the granting of such letters, is not to be deemed any part of the time limited by law for the commencement of actions by executors or administrators. See *ante*, 51, § 9.

A claim disputed or rejected by an executor or administrator, and which has not been referred, must be sued upon within six months after such dispute or rejection, if the debt, or any part of it, be then due; or within six months after some part thereof shall become due, or be forever barred. 2 R. S. 89, § 38.

This provision is only applicable to cases where the presentation and rejection of the claim occurs after the publication of the notice requiring creditors to present their claims against the estate. *Tucker v. Tucker*, 4 Keyes, 136; *Whitmore v. Foose*, 1 Denio, 159.

The rejection of a claim by the executor or administrator must be express and final, to entitle him to the protection of the statute. *Barsalou's Case*, 4 Abb. 135.

b. Suits against heirs or devisees. No suit is allowed to be brought against the heirs or devisees of any real estate, in order to charge them with the debts of the testator or intestate, within three years from the granting of letters testamentary or of administration, upon the estate of their testator or intestate. 2 R. S. 109, § 53.

The title of a purchaser in good faith from heirs cannot be impaired, by virtue of any devise of their immediate ancestor, unless the will of such ancestor shall have been duly proved and recorded within four years from his death, except where disability or concealment exists, as specified under subdivisions 1 and 2, in which cases, the limitation is to commence from one year after the removal of the disability or from the delivery of the will to the devisee, or his representative, or to the proper surrogate. 1 R. S. 748, § 3.

c. Actions for dower. The time within which a widow is allowed to demand her dower is twenty years from the death of her husband; but if, at the time of such death, she be under

 Actions brought in the name of the people.

the disabilities of infancy, insanity, or imprisonment, the time during which such disability shall continue is to be excluded from the term of twenty years. 1 R. S. 743, § 18.

d. Usury. An action to recover back money paid as usury must be brought by the payer or his representatives, within one year from the time of such payment, or within three years next after such one year, by the overseers of the poor, or county superintendent, or such action cannot be maintained. 1 R. S. 772, §§ 3 and 4.

e. Actions against stockholders. An action against a stockholder in a manufacturing company who shall cease to be a stockholder in such company, must be commenced within two years from the time that the defendant shall have ceased to be a stockholder. Laws of 1848, ch. 40, § 24.

When such corporation is indebted upon a promissory note, which is paid with the avails of a new note given by it for that purpose, such latter note will be a new debt, and if payable within one year, and sued within one year after it becomes due, the stockholders will be liable thereon. *Fisher v. Marvin*, 47 Barb. 159.

Section 16. Actions brought in the name of the people. Actions brought in the name of the people, or for their benefit, are subject to the same periods of limitation as those prescribed in like cases, in actions by private parties. Code, § 98.

ARTICLE IV.

GENERAL PROVISIONS AS TO THE TIME OF COMMENCING ACTIONS.

Section 1. Effect of acknowledgment or new promise.

a. Promise must be in writing. An acknowledgment of the existence of a liability, barred by the statute of limitations, or a new promise on a subsisting demand, has the effect to revive the cause of action, and take the case out of the operation of the statute. As the statute of limitations operates upon the remedy merely and does not extinguish the debt, the original obligation, barred by the statute, is a valid consideration for a new promise, and besides, the party making the new promise may be considered as waiving the bar, and an action may be sustained upon the original obligation as the cause of action. *Waltermire v. Westover*, 14 N. Y. (4 Kern.) 16; *Sands v. St. John*, 38 Barb.

Effect of acknowledgment—Voluntary.

628; 23 How. 140; S. C. aff'd, 29 id. 574 (n.); *Winchell v. Hicks*, 18 N. Y. (4 Smith) 558. Previous to the adoption of the Code, a verbal acknowledgment, admission, or promise was sufficient; but now, under the provisions of that instrument, "no acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest." Code, § 110.

The following decisions are all to the effect that the new promise to revive the debt must be in writing. *McLaren v. McMartin*, 36 N. Y. (9 Tiff.) 88; S. C., 33 How. 449; 3 Abb. N. S. 345; 1 Trans. App. 226; *Brookman v. Metcalf*, 4 Rob. 568; S. C., 34 How. 429; *Rowe v. Thompson*, 15 Abb. 377; *Hope v. Bogart*, 1 Hilt. 544; *Shapley v. Abbott*, 42 N. Y. (3 Hand) 443.

The effect of a partial payment is the same now as it was before the Code, and furnishes evidence from which a new promise may be inferred. *McLaren v. McMartin*, 36 N. Y. (9 Tiff.) 88; S. C., 33 How. 449; 3 Abb. N. S. 345; 1 Trans. App. 226. See, also, *Wakeman v. Sherman*, 9 N. Y. (5 Seld.) 85; reversing S. C., 11 Barb. 254.

b. Must be voluntary. The promise or acknowledgment must be voluntary, unconditional, and such as implies a willingness to pay it as a subsisting demand. *Bloodgood v. Bruen*, 8 N. Y. (4 Seld.), 362; reversing S. C.; 4 Sandf. 427. A compulsory acknowledgment, made in answer to a bill filed by a third person, or drawn out of the debtor while being examined as a witness, is not sufficient to raise the presumption of a promise to pay. *Bloodgood v. Bruen*, 8 N. Y. (4 Seld.) 362.

The acknowledgment must contain an unqualified admission of the debt, and show a willingness to pay it. *Turner v. Martin*, 4 Rob. 661; *Commercial Mutual Insurance Co. v. Brett*, 44 Barb. 489; *Loomis v. Decker*, 1 Daly, 186.

An assignment by an insolvent, enumerating a debt among his liabilities, is sufficient to take it out of the operation of the statute. *Stuart v. Foster*, 18 Abb. 305; S. C., 28 How. 273. But where a debtor proposed a compromise, declaring an unwillingness to pay if such compromise was rejected; *held*, not such a recognition as to take the case out of the statute. *Creuse v. Defiganieri*, 10 Bosw. 123.

How the statute is made available.

c. Must be made by party or agent. The acknowledgment or new promise must be made by the party to be charged, or by his authorized agent. *Winchell v. Hicks*, 18 N. Y. (4 Smith) 558.

An assignee for the benefit of creditors is not an agent authorized to renew a debt by a new promise. *Pickett v. Leonard*, 34 N. Y. (7 Tiff.) 175; affirming S. C., 34 Barb. 193. Nor can a surviving partner, as executor of his deceased partner, by a new promise, revive the debt against the estate of his deceased partner. *Van Keuren v. Parmalee*, 2 N. Y. (2 Comst.) 523; *Bloodgood v. Bruen*, 8 N. Y. (4 Seld.) 362. See *McNamee v. Tenny*, 41 Barb. 495.

There is no mutual agency between joint debtors by reason of their joint contract, hence, where one of several joint and several makers of a promissory note makes a payment upon it, before it is barred by the statute, such payment will not revive it as to the other makers. *Dunham v. Dodge*, 10 Barb. 566; *Shoemaker v. Benedict*, 11 N. Y. (1 Kern.) 176. A partial payment by an executor or administrator is not sufficient to revive the demand against the estate of the deceased. *McLaren v. McMartin*, 36 N. Y. (9 Tiff.) 88; S. C., 33 How. 449; 3 Abb. N. S. 345; 1 Trans. App. 226. Nor will the admission of an executor bind the estate. *Bloodgood v. Bruen*, 8 N. Y. (4 Seld.) 362.

d. To whom made. The acknowledgment or promise must be made to the creditor or some one acting in his behalf, and not to a stranger. *Wakeman v. Sherman*, 9 N. Y. (5 Seld.) 85; reversing S. C., 11 Barb. 254; *Bloodgood v. Bruen*, 8 N. Y. (4 Seld.) 362; reversing S. C., 4 Sandf. 427; overruling, *Phillips v. Peters*, 21 Barb. 351; *Watkins v. Stevens*, 4 id. 168. A promise to pay a negotiable note barred by the statute, made to the holder, inures to the benefit of a subsequent holder, and it is sufficient if the promise be made to an attorney who has it for collection. *Dean v. Hewitt*, 5 Wend. 257; *Pinkerton v. Baily*, 8 id. 600.

Section 2. How the statute is made available. The statute of limitations can be availed of as a defense, only by answer; and this rule applies in all actions commenced since the adoption of the Code, though the cause of action accrued before. *Lefferts v. Hollister*, 10 How. 383.

A party omitting to plead the statute of limitations, and going to trial without doing so, although the claim proved against him

Where the limitations of Code do not apply.

is clearly barred on its face, will be deemed as having elected to stand upon the other defenses, made to the demand on the trial, and will not be allowed to abjure such election. *Clinton v. Eddy*, 37 How. 23; S. C., 54 Barb. 54; *Bucklin v. Chapin*, 1 Lans. 443.

In proceedings before a surrogate, it is too late for executors to avail themselves of the statute as a defense, after the evidence is closed and the case has been submitted on written points. *Van Vleck v. Burroughs*, 6 Barb. 341.

Section 3. Where the limitations of Code do not apply.

a. *Actions on bank notes.* The provisions of the Code in reference to limitation of actions have no application "in actions brought to enforce the payment of bills, notes, or other evidences of debt, issued by moneyed corporations, or issued, or put in circulation, as money." Code, § 108.

b. *Actions against directors or stockholders.* Nor to actions against directors or stockholders of moneyed corporations or banking associations, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within six years after the discovery by the aggrieved party, of the facts upon which the penalty or forfeiture attached or the liability was created. Code, § 109.

c. *In cases of trust.* In cases of trust, the statutes of limitation proper have no application; but a court of equity will sometimes refuse relief, upon the ground of lapse of time and its inability to do complete justice. So long as the relation of trustee and *cestui que trust* is acknowledged to exist between the parties, and the trust is continued, lapse of time can constitute no bar to an account, or other proper relief to the *cestui que trust*. But where this relation no longer exists, or time has obscured the nature of the trust, or the acts of the parties, or other circumstances, give rise to presumptions unfavorable to its continuance; in all such cases, lapse of time will be a bar to relief. Story's Eq. Jur., § 1520.

In illustration of this principle, see *Ellison v. Moffat*, 1 Johns. Ch. 46; *Ray v. Bogart*, 2 Johns. Cas. 432; and *Kingsland v. Roberts*, 2 Paige, 193; *Lyon v. Chase*, 51 Barb. 13.

CHAPTER VII.

OF REMEDIES WITHOUT ACTION.

ARTICLE I.

OF PREVENTIVE MEASURES.

Section 1. In general. Courts of justice are instituted in every civilized society for the purpose of securing an effectual redress of private injuries, by protecting the weak from the insults of the stronger, and by expounding and enforcing those laws by which rights are defined and wrongs prohibited. This remedy is principally to be sought by an application to these courts of justice, by means of a civil suit or action. But, as there are certain injuries of such a nature that some of them furnish and others require, a more speedy remedy than can be had by the ordinary forms of justice, there is allowed, in any such case, an extrajudicial remedy without the aid of the courts. In many cases the most speedy justice afforded by the courts could not adequately supply the absence of such immediate and necessary remedies, nor could the natural impulse of self-defense against sudden and immediate aggressions be restrained. The law, therefore, permits parties to adopt certain modes of resistance, and merely interferes to modify and regulate the means employed. Laws for the prevention of injuries are sometimes better than those for compensation or punishment, as they prevent loss to the individual, and the necessity of prosecuting the wrong-doer at the risk of his being utterly unable to make compensation, or even to re-imburse the expenses of legal proceedings against him. Preventive remedies may be variously divided, and for the purpose of convenient discussion they will be presented in the order adopted in this chapter.

ARTICLE II.

DEFENSE BY RESISTANCE.

Section 1. In general. Self-defense is one of the first and strongest impulses of our nature. And the law respects the passions of the human mind so far as to render it lawful for him to do

 Defense of the person — Personal property.

himself that immediate justice to which he is prompted by nature, and which no prudential motives are strong enough to restrain. The future process of law may be by no means an adequate remedy for an injury accompanied by force; and it is impossible to say to what lengths of rapine or cruelty an outrage of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another. 3 Broom and Had. Com. 3. Self-defense, therefore, as it is justly called the primary law of nature, so is not, neither can it be in fact, taken away by the laws of society. Ib.

Section 2. Defense of the person. The strongest justifiable act of defense is the killing of the aggressor, and which of course includes battery, wounding, and mayhem, or a minor damage. The general rule is, that a homicide may be committed for the prevention of any forcible and atrocious crime, which would, if completed, amount to a felony, and, under the circumstances, a mayhem, wounding or battery would be equally justifiable.

Self-defense is also equally justifiable when a person is illegally attacked although the aggressor may not intend to commit a felony. But the party defending ought not to permit his resistance to exceed the bounds of defense and prevention, for if he does, he may become himself an aggressor.

Section 3. Defense of personal property. A man may repel force by force in defense of his personal property, and justify homicide against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, as robbery; but this rule does not extend to the case of a pickpocket, for that would not be a case of forcible felony. 1 Chit. Gen. Pr. 597. When one person has unlawfully entered upon the premises of another and possessed himself of the goods of the owner, the latter or his agent may, while upon his own premises, prevent the wrongdoer from taking such goods away, and may lawfully use so much force as may be necessary to retain his property and prevent its removal out of his custody and beyond his reach. The law does not oblige the owner of property to stand idly by and see a thief or trespasser take his property from his premises, or limit him to mere verbal remonstrance. He may act promptly, and whether he may use force or not in the first instance, and what degree of force depends upon the exigency of the particular case. *Gyre v. Culver*, 47 Barb. 592. The mere taking of the property by the owner, under such circumstances, from the cus-

Defense of real property.

tody of the wrong-doer, without other force or violence, does not constitute an assault and battery. And if the taking, or the attempt to take, is resisted by the trespasser, and he persists in his attempt to retain possession and to carry the property off, then the owner may lawfully use so much additional force as may be necessary to prevent it. *Ib.* But, even in such a case, the force must not exceed that necessary for the defense of the property. And where the plaintiff took hold of a rake in the defendant's hands in order to take it from him, upon which the defendant immediately knocked the plaintiff down with his fist, this was held to be an unlawful act. *Scribner v. Beach*, 4 Denio, 448.

Section 4. Defense of real property. A person may lawfully defend or protect the possession of real property, and if the assailant is attempting to commit a forcible felony, such as burglary, arson, or the riotous demolition of a house, the party in possession may resist even to the extent of taking the life of the felonious assailant. So where a forcible attack is made upon a dwelling-house, but without any felonious intent, and for the purpose of committing a mere trespass, it is, as a general rule, lawful to oppose force by force when the former is illegal. In such cases a party may justify a battery, by showing that he committed it in defense of his possession, as for instance to remove a trespasser out of his close or house, or to prevent him from entering it, or to restrain him from taking or destroying his goods; but the battery must here be limited to only that degree of violence and the use of such weapons only as may be absolutely essential to effect the object, and no more. A possession in fact, of land, will justify the possessor in using violence, if necessary, in order to defend his possession; but a mere right to the possession will not justify a person in committing an assault and battery upon another, for the purpose of reducing his right to actual possession. *Parsons v. Brown*, 15 Barb. 590. See, also, *Sage v. Harpending*, 49 id. 166; 34 How. 1; *Corey v. People*, 45 Barb. 262.

When the entry upon lands is made with no more force than that termed implied force, or force in law, there ought to be a request by the lawful possessor that the wrong-doer depart from the premises before a resort to actual force is employed for his removal. If he refuses to leave, then gentle force may be used; and, if he still resists, then such force as may be necessary may

Defense of other persons.

be employed. When the entry is forcible, it is lawful to use force against force without a previous request to depart. The distinction between an entry with actual force, and an entry with only implied force, with regard to a trespass on land, has been settled law from an early period.

A mere trespass on land, or that of the property thereon, is not such an act as justifies the owner in making use of a dangerous or a deadly weapon. There are several methods of protecting property, as by dogs and by instruments dangerous to trespassers, but information relating to cases of that kind must be sought in works devoted to the explanation of such subjects.

ARTICLE III.

DEFENSE OF OTHERS.

Section 1. In general. The principle which sanctions the defense of one's own person is extended to certain relations. Thus husband and wife, parent and child, master and apprentice, and master and servant are legally excused, and sometimes even justified, in killing an assailant about to commit a forcible felony upon the other, when such homicide has been committed in the necessary or lawful defense of each other; the act of each of those relations being then construed the same, and equally permitted as the defense of the party himself. 1 Chit. Gen. Pr. 613. This principle extends still further, for, if a felonious attack is made upon an individual, then any other person, though not a relative, may lawfully interfere to prevent the mischief intended, and, if in so doing, death ensues, he will, in that case, be justified. Ib. But with regard to mere trespasses, there is a very material difference between the interference of certain relations and of mere strangers. The former may justify immediate resistance with force when necessary, but a stranger can only interfere moderately, and with gentle hand to prevent the wrong. Ib. A mere stranger cannot justify an interference with force in the first instance to prevent a battery of a third person or any other trespass or civil injury, where death or any felony is not likely immediately to occur, but must proceed more moderately, and should previously declare or signify that he interferes merely to preserve the peace and not as a partisan, and he can only justify the gently laying on of his hands to prevent a breach of the

Apprehending criminals and wrong-doers.

peace ; though afterward, if he be himself attacked by either party, he may then defend himself with the same degree of force as if he had been originally illegally assailed. Ib. 615.

ARTICLE IV.

APPREHENDING CRIMINALS AND WRONG-DOERS.

Section 1. In general. One of the most immediate and effectual means of preventing an injury or securing punishment for its completion is the apprehension and detention of the wrong-doer while in the act of committing the offense ; or in the case of a felony when he is escaping ; and, also, of seizing his engines or implements about to be used and then using for the wrongful purpose. In such cases an arrest may be made without waiting for a criminal warrant, for, if it were necessary to wait for that process, many unknown and transient offenders would escape. In most cases of mere civil injuries without force, or even for a breach of the peace, as an assault and battery, no private individual can, at common law, arrest, apprehend or imprison the wrong-doer, but can at most remove him from his house without any imprisonment.

But private individuals are not only permitted, but enjoined, by law, to arrest an offender when they are present at the time when a felony is committed or a dangerous wound given, and when they witness the same, on pain of fine or imprisonment, if the wrong-doer should escape through their negligence.

In cases of misdemeanor, a private person cannot, at common law, apprehend another after the misdemeanor or breach of the peace is over, without a warrant, unless he had a view of the misdemeanor or breach. As the cases are very numerous in which arrests may be made without warrants, no enumeration will be here attempted.

It may, however, be stated, that when it is doubtful whether a party has committed a felony, the safer rule will be to procure a warrant for his arrest, since, in that case, the party arrested, although innocent, cannot maintain an action unless the charge was maliciously made against him without reasonable cause. When a private person has apprehended a supposed offender, he ought immediately, or as soon as practicable, to deliver the prisoner to a constable, or convey him before a magistrate, or to the county jail.

ARTICLE V.

RESISTANCE OF PROCESS, ESCAPES, RESCUES, ETC.

Section 1. In general. When persons having lawful authority to arrest, apprehend, or imprison, or otherwise to advance or execute the public justice of the State, either civil or criminal, and using the proper means for that purpose, are resisted in so doing, not only is such resistance of itself illegal and punishable at common law, but if the party illegally resisting, or any other assisting him, be killed in the struggle, such homicide is justifiable; while on the other hand, if the party having such authority, and executing it properly, happen to be killed, it will, at common law, be murder in all who take part in such resistance. 1 Chit. Gen. Pr. 633.

But it will be found that the common law, and all statutes upon the subject, either expressly or impliedly, suppose that the arrest or imprisonment has been lawful, and therefore an indictment or prosecution for the resistance, or rescue, or prison breaking, must show the nature and cause of the imprisonment from which the party escaped or was rescued, in order that it may appear that the rescue or escape was illegal. Ib. 634.

When the attempted arrest is without legal authority, it is lawful for the party thus threatened with arrest to resist in self-defense, though he ought not to use any dangerous or deadly weapon for that purpose. And if arrested he may lawfully escape, or be rescued, or even break prison, and others may assist him in so doing. Ib. 635. But when the process or arrest has a semblance of legality and regularity, the prudent course will be not to resist its execution, as there are proper and efficient modes of obtaining relief from an illegal imprisonment.

ARTICLE VI.

RECAPTION OF PERSON OR PROPERTY.

Section 1. In general. Recaption or reprisal is another species of remedy by the mere act of the party injured. This happens, when any one has deprived another of his property in goods or chattels personal, or when he detains one's wife, child or ser-

Recaption of a person of a relative — Of personal property.

vant; in which case, the owner of the goods, the husband, parent or master, may lawfully claim and retake such property in person, wherever found, provided it is not done in a riotous manner, or attended with a breach of the peace. The reason for this is obvious, since the owner may not have any other opportunity of doing himself justice, as his goods might be afterward conveyed away or destroyed, and his wife, child, or servant concealed or carried out of his reach, if he had no speedier remedy than the ordinary process of law.

The public peace, however, must be considered rather than any one man's right of property, and since, therefore, if private individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease. The strong would give law to the weak, and every man would revert to a state of nature. For these reasons, it is provided that this natural right of recaption shall never be exerted when such exertion must occasion strife and bodily contention, or endanger the peace of society.

Section 2. Recaption of the person of a relative. When a wife, child, or an apprentice, has been taken away wrongfully by the party withholding either, the person entitled to the custody may at once, and without any formal request or demand, peaceably enter the house of the wrong-doers, the outer door being open, and carry away the party wrongfully detained. But such recaption cannot be legally effected in a riotous manner, nor should it be attended with a breach of the peace; but, although a forcible entry were made, and the party might be liable to an indictment for such breach of the peace, yet, unless some actual injury were committed to the person or property of the original wrong-doer, he could not sustain any civil action in respect of the forcible manner of regaining the wife, child or apprentice. If the recaption be resisted by force, the proper mode of procedure will be to apply for a writ of *habeas corpus*.

Section 3. Recaption of personal property. The same general principles govern this case as in those last referred to. In many cases a recaption of personal property may be the best, or indeed the only remedy, as when one joint tenant or tenant in common takes a chattel and assumes the exclusive possession, in which case no action at law would lie, and, therefore, the only remedy would be for the co-owner to retake the possession.

If a party has been wrongfully dispossessed of his personal

Recaption or re-entry on real property.

property, he may in general justify the retaking of it from the house and custody of the wrong-doer, even without a previous request to re-deliver it; for the violence which happens through the resistance of the wrongful taker being attributable to his own tortious act, deprives him of any right to complain; and the owner of personal property may retake the same, with a moderate degree of force, from a person wrongfully refusing to deliver the same up to him. *Burridge v. Nicholetts*, 6 H. & N. 389. See *Blades v. Higgs*, 11 H. L. Cas. 621; *Smith v. Wright*, 6 H. & N. 821. But in this recaption, care must be observed to avoid any personal injury, in any forcible entry or breach of the peace, and if either be anticipated, then the owner of the goods should replevy them, or resort to an action, rather than subject himself to a proceeding for the personal injury, or an indictment for a breach of the peace.

If the personal property was not originally illegally seized, but is merely wrongfully detained, then the owner must first request a re-delivery, and he cannot justify more than gently laying his hands on the wrong-doer in order to recover it; nor can the owner, without leave, enter the door of the house of a third person, not privy to the wrongful detainer, or take the goods therefrom; and the same doctrine extends to the land of a third person. *Patrick v. Colerick*, 3 M. & W. 486; *Anthony v. Haneys*, 8 Bing. 186.

Another general rule is, that the natural right of recaption should never be exerted where such exertion would occasion strife and bodily contention, or endanger the peace of society. The right of retaking goods fraudulently purchased, but not paid for, or of stopping them in transitu, is of the same general nature. See 1 Chit. Gen. Pr. 645.

Section 4. Recaption or re-entry on real property. As recaption is a remedy given to the party himself for an injury to his personal property, so a remedy of the same kind for an injury to real property is sometimes permitted by entry on lands and tenements, when another person without any right has taken or retains possession thereof. This depends in some measure on like reasons as the former; and like that, too, must be peaceable and without force or violence which might endanger the public peace. There is some nicety required in defining and distinguishing circumstances in which such entry might be lawful or otherwise, and especially in determining whether notice should

Recaption of property — Abatement of nuisances.

be given before re-entry and eviction to the person who is wrongfully in possession. 3 Broom & Had. Com. 5.

If the owner enters by force he may be indicted for a breach of the peace, but he will retain the lawful possession of his estate, and the original wrong-doer cannot maintain a civil action for such regaining of the possession, so far as it regards any alleged injury to the house or land, or for the expulsion. *Willard v. Warren*, 17 Wend. 257; *Winter v. Stevens*, 9 Allen (Mass.) 526; *Krevet v. Meyer*, 24 Mo. 107; *Newton v. Harland*, 1 M. & Gr. 644; *Harvey v. Brydges*, 14 M. & W. 437; 1 Exch. 261. The party thus turned out may, however, maintain an action for any unnecessary personal injury which he may have sustained, or for any damage to his furniture which could have been avoided. And he may, in some cases, resort to proceedings under the statute relating to forcible entries and detainers. *People ex rel. Kearney v. Carter*, 29 Barb. 208; *People ex rel. Gault v. Van Nostrand*, 9 Wend. 50; *Jackson d. Stansbury v. Farmer*, id. 201.

But he cannot maintain this proceeding if he has no right of possession of such premises. *People ex rel. Cooper v. Fields*, 1 Lans. 222; S. C., 58 Barb. 270; *People ex rel. McInroy v. Reed*, 11 Wend. 157. Upon the question of a right to maintain proceedings for a forcible entry and detainer in such a case, the authorities are not entirely in harmony.

ARTICLE VII.

ABATEMENT OF NUISANCES.

Section 1. In general. Another species of remedy by the mere act of the party injured is the abatement or removal of a nuisance. It may be observed, generally, that whatsoever unlawfully annoys or does damage to another is a nuisance, and such nuisance may sometimes be abated, that is, taken away or removed, by the party aggrieved thereby, provided he does not commit any riot in doing it. Nuisances may be public or private. A public or common nuisance is such an inconvenience or public offense as annoys the whole community in general, and not merely some particular person.

A private nuisance is any thing unlawfully and tortiously done to the hurt or annoyance of the person, or of the lands, tenements or hereditaments of another.

Private nuisances.

Section 2. Private nuisances. The reason why the law allows the abatement of a nuisance, private or public, by any individual annoyed by it, is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice. To enumerate the instances in which a party may abate a private nuisance, is not intended, but merely to state some of the general rules recognized by law, and to be observed by the parties resorting to this mode of relief.

Where a nuisance was occasioned by the tortious misfeasance or malfeasance of another, the party thereby injured may, in general, abate the nuisance immediately, and without any previous notice or request; but if the nuisance be merely continued by a party who did not erect it, or when it consists in the omission of a party, he ought to be requested to remove it before the party injured can himself remove the injury; for nuisances, by an act of commission, are committed in defiance of those whom such nuisances injure, and the injured party may abate them without notice to the person who committed them. *Jones v. Williams*, 11 M. & W. 176. But the law does not sanction the abatement by an individual of nuisances from omission, except that of cutting branches of trees which overhang a public road or the private property of the person who cuts them; or removing obstructions from a public highway, where special injury is done to the party so abating it. *Northrop v. Burrows*, 10 Abb. 365. See, also, *Rogers v. Rogers*, 14 Wend. 131; *Griffith v. McCullum*, 46 Barb. 561; *Howard v. Robbins*, 1 Lans. 63. In removing a private nuisance, care should be taken not to abate more or to go further than to restore the party injured to the enjoyment of his right as it existed before the nuisance was created; for, if a party goes beyond this, and unnecessarily injures or destroys the property constituting such nuisance, he will be guilty of an illegal act. *Ib.* See 1 Wait's Law & Prac. 748 to 754.

A house which is wrongfully built upon a common, and which obstructs the right of common, may, after notice and request by a commoner to remove from the house, be pulled down, although the builder and his family were actually inhabiting and present in the house. *Davies v. Williams*, 16 Q. B. 546. See *Perry v. Fitzhove*, 8 id. 757. So of a person who enters upon the lands

Public nuisances — Damage feasant.

of another, and unlawfully builds a house. *Burling v. Read*, 11 Q. B. 904; *Davison v. Wilson*, id. 890.

Section 3. Public nuisances. Private citizens are permitted, in many cases, to abate public nuisances without the interposition of any legal authority. It is clear that any one may, in some cases, justify the removal of a common nuisance, whether on land or on water. If a gate or wall be erected across a public highway, so as to constitute a common nuisance, then any person passing along such highway may tear it down or destroy it if necessary to restore the highway to its proper condition for his passage along it. *Northrup v. Burrows*, 10 Abb. 365. But he cannot lawfully do any needless injury to such property, even though it be in a public highway, for if he wantonly or unnecessarily destroys it he will be liable to an action. *Rogers v. Rogers*, 14 Wend. 131.

A fence so built as to encroach upon a public highway is a public nuisance, and yet, if there is sufficient room for persons to travel along such highway, it will be an unlawful act for a traveler or other person to remove or destroy such fence. *Griffith v. McCullum*, 48 Barb. 561; *Harrower v. Ritson*, 37 id. 301; *Peckham v. Henderson*, 27 id. 207; *Howard v. Robbins*, 1 Lans. 63. It is not every nuisance that may be removed by a private person, for although a fence is so far an encroachment upon a public highway as to constitute a public nuisance, yet an individual cannot lawfully remove it unless it prevents his passage along such highway. *Ib.* *Dimes v. Pelley*, 15 Q. B. 276; *Bridge v. Grand Junction Railway Co.*, 3 M. & W. 244; *Davies v. Mann*, 10 id. 548; *Mayor of Colchester v. Brooke*, 7 Q. B. 339; *Bateman v. Bluck*, 18 id. 870; *Roberts v. Rose*, 3 H. & C. 162; L. R. 1 Ex. 82.

ARTICLE VIII.

DISTRESS AND SEIZURE OF CATTLE.

Section 1. In general. The taking of cattle or chattels, as a distress, whether damage feasant or for rent, where that is permitted, or for other claims, is also one of those remedies permitted by law. See 1 Wait's Law and Prac. 788 to 791.

Section 2. Damage feasant. When the animals of one person unlawfully go upon the lands of another person and there do

Damage feasant.

damage, as by treading down the grass, grain or other productions of the earth, the owner of such land may lawfully seize such animals instead of bringing an action for the trespass. This remedy exists at the common law, but it is frequently modified or regulated by statutes. See 2 R. S. 517 to 521. Some of the rules to be observed in pursuing this remedy will be briefly noticed. If a party elects to distrain cattle or chattels damage feasant, he must follow strictly the course pointed out by the statute.

No one ought to distrain cattle damage feasant unless he has the legal title or the right to the possession of the land upon which they are found.

The remedy by distress, given by the statute, is cumulative, and the distrainer may, if he pleases, pursue the common-law remedy by action of trespass. Before making a distress, the party should consider whether the trespass was not justifiable by reason of his own omission to keep his fences in repair. The cattle must be taken while actually upon the land and in the very act of doing damage, and not after it is over, or at least not after they have escaped from the land, even though the owner of the land was pursuing them, and the owner of the cattle drove them off for the purpose of preventing the distress.

A horse cannot be distrained if there be a rider upon him at the time. *Storey v. Robinson*, 6 Term. R. 138. Nor can a horse and cart be so taken, if, at the time of distraining them, they are in the actual possession, care and use of the party driving them. *Field v. Adames*, 12 Ad. & E. 649. The rule is otherwise as to a dog. *Bunch v. Kennington*, 1 Ad. & E. N. S. 679.

The cattle taken cannot legally be impounded after an adequate tender of amends made before impounding.

Again, the cattle distrained must not be beaten or wounded, or worked, or used. For, doing either of these acts would render the party distraining liable to an action.

The manner of disposing of a distress is pointed out in this State by statute. 2 R. S. 517 to 521.

The statutes relating to cattle running in public highways will be found, Laws 1862, ch. 459 ; Laws 1867, ch. 814 ; Laws 1869, ch. 424.

For some of the decisions upon the question, see *Rockwell v. Nearing*, 35 N. Y. (8 Tiff.) 302 ; *Campbell v. Evans*, 54 Barb. 566 ; *Fox v. Dunckle*, 55 id. 431 ; 38 How. 136 ; *Leavitt v. Thomp-*

Retainer.

son, 56 Barb. 542; *McConnell v. VanAerman*, id. 534; *Squares v. Campbell*, 41 How. 193.

ARTICLE IX.

RETAINER, REMITTER AND LIEN.

Section 1. Retainer. Retainer is the act of withholding what a party has in his hands by virtue of some right. An executor or administrator has, in some cases, a right to retain a debt or sum due to him from the estate, or the testator or intestate. A sole executor may retain in those cases where, if the debt had been due to a stranger, the latter might have sued and recovered the sum of such executor, whether the debt were due to himself or due to him in right of another, or to another in trust for him. If there are several executors, and one of them has a claim against the estate of the deceased, he may retain it with or without the consent of his co-executors; and if there are several creditors among the executors, each of the same degree, and the estate is insolvent, they may retain *pro rata*.

The right of retainer may be exercised where the deceased was bound alone, where he was bound with others, and where the executor of the obligee is also executor of the obligor.

As there is quite a diversity in the practice of different States and countries in relation to the priority of claims, there will be no attempt at an enumeration of them. Funeral expenses and physicians' bills usually have a preference over other claims.

Where the nature of the claim is arbitrary and unascertained, as in the case of a claim for damages for a tort, there cannot be a retainer; therefore, where the claim is for damages for the breach of a pecuniary contract, there may be a retainer, as there is a certain measure of damages. An executor is not bound to plead the statute of limitations against a just debt, and therefore that statute does not operate against his claim.

In case the estate is insolvent, the executor's right to retain is limited by the rights of other creditors who are equally entitled with himself to payment. At common law a creditor obtained an advantage by obtaining the first judgment against an executor and, as an executor could not sue, he might retain his whole claim in preference to other creditors. This rule is abrogated in some of the States, and is in force in others.

Remitter — Lien.

Section 2. Remitter. This takes place when he who has the true property in lands is out of possession and has no right to enter without recovering possession in an action, but afterward has the freehold cast upon him by some subsequent, though of course, defective title. In this case he is remitted, or put back, by operation of law, to his ancient or more certain title. This right of entry which he has gained by a bad title is, *ipso facto*, annexed to his own inherent good one, and the defeasible estate is utterly defeated and annulled by the instantaneous act of law without his participation or consent. The reason assigned for this rule is, that, being so remitted, the owner has no means of asserting his title, because, being in possession, he cannot sue himself, and, to prevent his loss, the law places him in the same situation as if he had established his right by action or suit. But, to enable the owner of the land to take advantage of this principle, the title must be cast upon him by the law, as by descent; for, if he undertakes to buy the subsequent estate or right of possession, he is considered as having waived his prior right, and therefore he is not remitted. Whenever this right of remitter exists, it takes place regardless of the will or intention of the party benefited. He is remitted *nolens volens*. But there is no remitter to a right which is extinguished, or for which the party has no right of action, as in the case of a claim barred by the statute of limitations. See *Doe d. Daniell v. Woodroffe*, 10 M. & W. 608; 15 id. 768; 2 H. L. Cas. 811.

Section 3. Lien. A lien, when considered as a remedy in the hands of the party, may be defined as the right of detaining the property of another until some claim is satisfied. There may be liens which arise by operation of law, or which are created by the express agreement of the parties. A right to retain property in respect of money or labor expended on some particular property is a particular lien. A general lien is one which binds all the property of the debtor which may happen to be in the hands of his creditor. To specify all the cases in which a party has a right to retain property by virtue of a lien, is foreign to the design of this work; but the general rule is, that a party, who is in possession of property by virtue of a valid lien, may retain the possession until his claim is paid. This claim may be lost or waived by any act of the parties by which it may be surrendered or become inapplicable.

In general, possession is not only essential to the creation, but

Accord — Arbitration.

also to the continuance, of the lien ; it may, therefore, be lost by voluntarily parting with the possession of the goods.

The right of the holder of the lien is generally confined to the mere right of retainer. Whether an authority to sell exists, is a matter to be carefully examined before exercising any, such power. In some cases a court of equity will decree a sale to satisfy such lien.

ARTICLE X.

REDRESS BY JOINT ACTS OF THE PARTIES.

Section 1. In general. There are two remedies which may be secured by the joint act of both parties, and thus obviating the necessity for an action. One is by an accord, and the other by arbitration. These will be briefly noticed in their order.

Section 2. Accord. An accord is the settlement of a dispute, or the satisfaction of a claim, by an executed agreement between the party injuring and the party injured. Some of the requisites of an accord are the following ; It must be legal ; it must be advantageous to the party claiming the performance of a contract, or damages for an injury ; it must be certain ; the defendant must be privy to the contract, as an accord from a stranger is not sufficient ; the accord must be executed, for until then it is no satisfaction ; the acceptance of a collateral thing of value is a good satisfaction ; so is a mutual agreement to discontinue two cross-actions. An agreement to pay a less sum of money in discharge of a larger money debt is not a good accord, unless the money is paid before the larger sum was due, or at a different place. The effect of a valid accord and satisfaction is to discharge the claim made, and to bar any future action upon it. See 1 Wait's Law and Prac. 1036 to 1042.

Section 3. Arbitration. An arbitration is a submission and reference of a matter in dispute concerning property, or in relation to a personal wrong, to the decision of one or more persons, called arbitrators, who are to render a judgment thereon, called an award. The general subject of arbitrations will be explained elsewhere and the subject will be dismissed, with the general remark, that a valid submission and a proper award thereon will bar any action upon the claim submitted and passed upon. See 1 Wait's Law and Prac. 1011 to 1036.

ARTICLE XI.

REDRESS BY OPERATION OF LAW.

Section 1. In general. A part of the remedies of this nature have already been noticed under another head. See Retainer, Remitter, Lien.

Section 2. Set-off. The right of a party to set-off his demand against the claim of another person against him did not exist at common law. The principle of set-off is, that when one man has a claim for a sum of money against another, and is also indebted to him, he may consider his claim to be a discharge or extinguishment of his debt, if it be equal in amount, or *pro tanto*, if unequal. This rule is founded upon reason and justice, and it tends to prevent the unnecessary multiplication of suits with their attendant inconveniences and costs. As the subject of set-off will be fully explained in this work, no further notice is here necessary, except to state that the right, as it now exists, is founded upon various statutes. See 1 Wait's Law and Prac. 966 to 979.

Section 3. Marriage of debtor and creditor. By the common law, if a woman married her creditor or her debtor, in either case the debt was absolutely extinguished. No discussion of this matter is to be expected here, as the mere mention of it will call attention to this subject, which is all that is needed.

ARTICLE XII.

CAUTIONS IN RELATION TO RESORTING TO THESE REMEDIES WITHOUT ACTION.

Section 1. In general. It is to be remembered that although the law allows an extrajudicial remedy, yet that remedy is not compulsory, and does not exclude the ordinary course of justice; it is only an additional weapon put into the hands of persons in particular instances, when natural equity or the peculiar circumstances of their situation require a more expeditious remedy than the formal process of a court of judicature can furnish. In many cases the party may resort to both remedies. A party who is assaulted may defend himself from violence, and yet may

Cautions in relation to resorting to these remedies without action.

afterward bring his action for the assault. A person may retake his goods in a fair and peaceable way, and the recaption does not bar his subsequent action, although the return may mitigate damages. A party may enter on lands, if he has a right of entry, or may demand possession by action. So he may abate a nuisance or call upon the law to do it for him. There is one general consideration which ought always to be borne in mind, and that is, there are cases in which a resort to these remedies, by the act of the party, will bar him from bringing a subsequent action for the same subject-matter.

As this chapter was designed to be a mere statement of general rules for the information of the student, and for the convenience of the practitioner, rather than a treatise upon the topics mentioned, the reader will be required to examine other works whenever it may become important to examine the law applying these rules to any particular case.

CHAPTER VIII.

EVIDENCE TO SUSTAIN ACTION.

ARTICLE I.

IS IT EXISTENT AND AVAILABLE.

Section 1. In general. Although the plaintiff's right of action may be clear upon such facts as he has assumed to be true, yet he cannot safely bring an action unless he can prove the existence and truth of such facts on the trial of the cause. If he is not possessed of such evidence, or cannot procure it, he is in precisely the same condition as though such facts had no existence.

In a subsequent part of this work will be pointed out in detail the various kinds of evidence which may be used and the modes of procuring it. At present, nothing more will be done than to throw out some considerations to the student or the young practitioner by way of hints in relation to the securing of evidence to sustain the action or the defense.

ARTICLE II.

DOCUMENTARY EVIDENCE.

Section 1. In general. Documentary evidence is most usually in a written or printed form and is frequently termed written evidence. The term "documentary evidence" properly includes all material substances on which the thoughts of men are represented by writing, or any other species of conventional mark or symbol. Best on Ev. 298, § 215. Thus the wooden scores on which bakers, milkmen, etc., indicate by notches the number of loaves of bread or quarts of milk supplied to their customers, the old English exchequer tallies, and such like are documents, as much as the most elaborate deeds. Ib.

Documents, being inanimate things, necessarily come to the cognizance of tribunals, through the medium of human testimony, for which reason some old authors have termed them *dead* proofs in contradistinction to witnesses who are said to be *living* proofs.

ARTICLE III.

WRITTEN EVIDENCE.

Section 1. What it is. Although documentary evidence most usually presents itself in a written or printed form, the terms "writing" and "written evidence" have obtained, in law, a secondary and limited signification in which they are commonly but not always used; and much confusion has arisen from the ambiguous meanings of these terms. The force of written proofs consists in this, that men have agreed together to preserve, by writing, the recollection of things past, and of which they were desirous to establish the remembrance, either as rules for their guidance or to have therein a lasting proof of the truth of what they write. Thus, agreements are written to preserve the remembrance of what the contracting parties have prescribed for themselves, and erect that which has been agreed on into a fixed and immutable law for them. So, wills are written to establish the recollection of what a person who had the right to dispose of his property, has ordained, and make thereof a rule for his heirs and legatees. In like manner are written sentences, decrees, edicts, ordinances, and every thing intended to have the effect of title or of law. The writing preserves unchangeably what is intrusted to it, and expresses the intention of the parties by their own testimony. It is to such documents as these that the terms "writing" and "written evidence" are commonly applied in our books.

Section 2. Division of writings. Writings are of two kinds, public and private. Under the former are classed acts of parliaments, of congress, of the legislatures of States; judgments, decrees and acts of courts, whether of voluntary or contentious jurisdiction; proclamations, public books, and the like. They may also be divided into writings, judicial and not judicial; of record and not of record. Records are the memorials of the legislature and of the courts. Among private writings, the first and most important are those which fall under the description of "deeds," that is, of "writings sealed and delivered." And they differ from inferior written instruments in this important particular, that they are presumed to have been made upon a good consideration; and this presumption cannot be rebutted,

Oral evidence.

unless the instrument is impeached for fraud, while in contracts not under seal, a consideration must be alleged and proved.

In this State there is a statute which authorizes the introduction of evidence to show a want of consideration in a sealed instrument. 2 R. S. 406, § 77.

The mode of executing or proving deeds need not be noticed in this place.

Instruments in writing, and not under seal, are very numerous and in daily use, and the proper execution, and due proof of them on a trial, is an essential part of a case.

Wills form an important class of writings, especially as to the mode of their execution, and in making due proof of them.

Stamps are essential to the validity of many instruments, and the affixing and proper cancellation of them will always be a subject of attention.

Written memoranda may be evidence in some cases, though a mere mention of them is all that is here intended.

ARTICLE IV.

ORAL EVIDENCE.

Section 1. Witnesses. Nearly every case depends, to a greater or lesser extent, upon the evidence given by living witnesses, orally, in open court. To secure their attendance is one of the most important steps, in preparing a cause for trial.

Section 2. Depositions. When the personal attendance of a witness cannot be procured, or when it is equally available in the form of a deposition, the party desiring the evidence may secure it by means of a commission, if issued in due time, and in a proper manner.

Section 3. Perpetuating evidence. Whenever any kind of evidence may be lost to a party, his first duty is to take such steps as may be in his power to secure its preservation. This is especially true when that evidence rests in the recollection of a single person, who may be old, sick, or otherwise liable to sudden death. In all such cases, prompt measures for the perpetuation of his testimony is an indispensable duty.

Section 4. General remarks. The most important part of a lawyer's duty, in every case, is to see that it does not fail from the want of evidence which due care and diligence would have

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secured. To lose a cause, or to fail in a defense, from such a neglect of duty, is a gross wrong toward a client who has risked his cause to one who was so unworthy of public or private confidence. If a cause must be in any manner neglected, let it not be in the direction of failing for want of proofs which were in existence, and available if properly procured. It is the duty of every practitioner to understand the law of his case; but, if he is not as well prepared upon this point, the learning of the presiding judge will furnish and apply the proper rule of law as a part of his duties; though he will never, if he could, supply the defects arising from a want of proofs, which the culpable neglect of the attorney has rendered unavailable.

CHAPTER IX.

PARTIES TO ACTIONS.

ARTICLE I.

WHO MAY SUE IN THE COURTS OF THIS STATE.

Section 1. The real party in interest.

a. In general. Under the former practice, the rules of law and of equity were widely dissimilar, in regard to the proper parties to an action. At common law, every action upon contract was required to be brought by the contracting party, if living, or by his legal representative, if dead. In actions for torts, the party doing, or receiving an injury, must be made plaintiff or defendant, and, on the death of either party, the right of action died also. Choses in action were not assignable at common law, so as to authorize the assignee to sue in his own name, yet the assignee was allowed to prosecute an action for their recovery in the name of the assignor, upon the principle that the assignor held the legal right for the use and benefit of the assignee. And, in general, the holder of the legal right was made the plaintiff in the action. *Anderson v. Martindale*, 1 East, 497; *Jessel v. Williamsburgh Ins. Co.*, 3 Hill, 88; *Mann v. Herkimer Co. Mutual Ins. Co.*, 4 id. 187; *Luckey v. Gannon*, 1 Sweeny, 12 (17); S. C., 37 How. 134; 6 Abb. N. S. 209. See *Grinnell v. Buchanan*, 1 Daly, 538. Under the old chancery practice, however, the suit must be brought by the real party in interest, and the mere nominal owner of the right of action who had no interest in it could not sue, unless he held such nominal interest as trustee. *Rogers v. Traders' Ins. Co.*, 6 Paige, 583 (597); *Field v. Maghee*, 5 id. 539; *Oakey v. Bend*, 3 Edw. Ch. 482.

The practice, as it existed in equity, is substantially retained under the Code, so far as it relates to parties to an action. *Brownson v. Gifford*, 8 How. 389 (395); *Hollenbeck v. Van Valkenburgh*, 5 id. 281 (285); S. C., 1 Code R. N. S. 33; *Wallace v. Eaton*, 5 How. 99; S. C., 3 Code R. 161. The common-law rule has ceased to exist in this State since the adoption of the Code. *Luckey v. Gannon*, 1 Sweeny, 12 (17); S. C., 37 How. 134; 6

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Abb. N. S. 209; *Fowler v. N. Y. Indemnity Ins. Co.*, 23 Barb. 143 (145). By the requirements of that act it is made necessary that every action shall be prosecuted in the name of the real party in interest, except actions brought by an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute to sue; in which actions, it is unnecessary to join as plaintiff, the person for whose benefit the action is prosecuted. Code, §§ 111, 113; *Hoogland v. Hudson*, 8 How. 343; *Mead v. Mitchell*, 5 Abb. 92 (106); S. C. affirmed, 17 N. Y. (3 Smith) 210. It is obviously impossible to give any universal rule by which to determine who is or who is not the real party in interest in every controversy. The right of ownership alone will furnish no reliable test, for while, as a general rule, the owner of a chattel is the proper party to bring an action for its possession, or to recover damages for its injury, a party having no right of ownership, but only a special interest in the property accompanied by possession, may also maintain an action for the same purpose. *Harrison v. Marshall*, 4 E. D. Smith, 271; *Paddock v. Wing*, 16 How. 547; *Green v. Clarke*, 12 N. Y. (2 Kern.) 343. Neither will possession under title give an exclusive right of action, as a remainder-man in fee may maintain an action for an injury done to the inheritance, although a separate action might be maintained for the same cause by the owner of an intervening life estate. *Van Deusen v. Young*, 29 N. Y. (2 Tiff.) 9.

Neither will the character of the interest, as whether legal or equitable, furnish a reliable test by which to determine the real party in interest. A person in possession of lands, under a contract to purchase, is deemed the equitable owner, and may maintain an action to recover damages for injuries thereto. *Rood v. New York and Erie R. R. Co.*, 18 Barb. 80. So a party who has redeemed land sold on execution, after receiving the sheriff's deed, may maintain an action in the nature of waste against any person who, intermediate the sale and the deed, cuts timber and takes it from the premises. The legal estate is deemed vested in the grantee by relation as of the time of the sale. *Thomas v. Crofut*, 14 N. Y. (4 Kern.) 474; *Potter v. Cromwell*, 40 N. Y. (1 Hand) 287. It is a general rule, capable of practical application, that the party who will be directly benefited by the successful prosecution of an action, and who will be entitled to receive the damages recovered, is the proper party to be made plaintiff in the action. Thus, in an action upon a promissory note, the party having the whole

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interest therein, whether his title to the note is legal or equitable, whether he was an original party to the instrument, or merely the owner by assignment, and whether the note is in his possession, or that of a third party, is the real party in interest. *Hastings v. McKinley*, 1 E. D. Smith, 273; S. C. affirmed, Seld. Notes, Nos. 4, 19; *Savage v. Bevier*, 12 How. 166; *Selden v. Pringle*, 17 Barb. 458; *Cummings v. Morris*, 3 Bosw. 560 (576); S. C. affirmed, 25 N. Y. (11 Smith) 625. So where the statute imposes a penalty for fraud, to be sued for, for the benefit of the person or persons upon whom the fraud is committed, and where the statute does not, in terms, specify who shall be the plaintiff, the action should be brought in the names of the persons for whose benefit the suit is prosecuted, or, in the words of the Code, in the name of the real party in interest. *Thompson v. Howe*, 46 Barb. 287. So, in general, where a pecuniary penalty or forfeiture is specially granted by law to any person injured or aggrieved by the act or omission of another, the action must be brought by the person to whom the penalty is granted. *Ib.* 2 Wait's Law and Prac. 284.

b. Exceptions to the rule. The section of the Code which contains the requirement that every action must be prosecuted in the name of the real party in interest, also contains the exceptions to the rule, and specifically provides that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. Code, §§ 111, 113. These exceptions are important, and will be fully discussed under appropriate heads, in a subsequent part of this chapter. See §§ 7 and 8, *post*. So an action may be maintained by a grantee of land in the name of a grantor, or his or her heirs or legal representatives, when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant, and the plaintiff will be allowed to prove the facts to bring the case within this provision. Code, § 111. It is also provided that the section of the Code above cited shall not be deemed to authorize the assignment of a thing in action not arising out of contract. This leads to the consideration of the effect of an assignment of the subject of an action, as affecting the right to sue.

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c. *Where the right of action is assignable.* The provisions of the Code have made no change in the law of assignments. No authority is given by that act for the assignment of any right of action which was not assignable under the former practice, and no right of assignment which existed before its adoption has been taken away by it. *Purple v. Hudson River R. R. Co.*, 1 Abb. 33; S. C., 4 Duer, 74; *Hodgman v. Western R. R. Corporation*, 7 How. 492. As has been previously stated, *ante*, 88, no mere right of action was so assignable at common law as to pass the legal right to the assignee or the right of suing in his own name; but when the cause of action affected the *estate* of the assignor, the court, exercising its equity powers, would protect the rights of the assignee in an action brought in the name of the assignor, in whom the legal estate still remained. The only change made by the Code was to transfer, with the beneficial interest, the right of action also, or, in other words, to allow the assignee of an assignable demand to prosecute in his own name, instead of in the name of the assignor, as formerly. *Hodgman v. Western R. R. Co.*, 7 How. 492; *Butler v. New York & Erie R. R. Co.*, 22 Barb. 110; *McKee v. Judd*, 12 N. Y. (2 Kern.) 622. It becomes important, in consequence of this change, to determine what rights of action are assignable, before attempting to determine who should be plaintiffs in such actions.

It is a general rule that a right of action, which, upon the death of a party, would pass to his executors as part of his assets, is assignable, and that the power to assign and to transmit to personal representatives, are convertible propositions. This was always the rule at common law, and is the true test, under the Code, to determine what right of action for a personal injury is capable of being transferred by assignment. *Zabriskie v. Smith*, 13 N. Y. (3 Kern.) 322; *Butler v. N. Y. & Erie R. R. Co.*, 22 Barb. 110; *Fried v. N. Y. Central R. R. Co.*, 25 How. 285; *Platt v. Stout*, 14 Abb. 178; *Chamberlain v. Williamson*, 2 Maule & Selw. 408; *People v. Tioga Common Pleas*, 19 Wend. 73; *Comegys v. Vasse*, 1 Pet. 213. This rule is clear and undisputed, and the only difficulty lies in its application. It should be borne in mind that, under existing laws, the assignability of a thing in action is the rule, and non-assignability the exception. *Meech v. Stoner*, 19 N. Y. (5 Smith) 26. The old rule of the common law, that actions for torts die with the person, has been materially modified by express statutes. A right of action, founded on tort,

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may be assignable, as well as an action founded on contract. The statutes provide that for wrongs done to the property, rights or interests of another, for which an action might be maintained against the wrong-doer, such action may be brought by the person injured, or, after his death, by his executors or administrators, against such wrong-doer, and, after his death, against his administrators, in the same manner and with like effect in all respects as actions founded upon contracts. 2 R. S. 447, § 1; (467), Edm. Ed.

But it also limits the application of this general rule by providing that the preceding section shall not extend to actions for slander, for libel, or to actions of assault and battery or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator. Id. § 2.

The exceptions contained in the second section are evidence that it was the intention of the legislature that all other actions founded upon tort should survive. *Haight v. Hayt*, 19 N. Y. (5 Smith) 464; *Fried v. N. Y. Central R. R. Co.*, 25 How. 285. Applying the test before mentioned, it follows that all causes of action arising in tort are assignable, except a cause of action for slander, for libel, or a cause of action founded upon assault and battery, false imprisonment or injuries to the person; or, in other words, every cause of action arising upon a tort which has caused special damage to the estate of the person entitled to sue is assignable, and the assignee may maintain an action thereon in his own name. *Butler v. N. Y. and Erie R. R. Co.*, 22 Barb. 110; *Meech v. Stoner*, 19 N. Y. (5 Smith) 26. The expression "actions on the case for injuries to the person," in the second section of the statute quoted, is used in its literal sense, and not in the same sense or meaning with personal right of action. *Fried v. N. Y. Central R. R. Co.*, 25 How. 285, 287.

A few illustrations of assignable torts are here given. It is well settled that a claim for the wrongful conversion of personal property is assignable, and that the assignee may maintain an action thereon in his own name. *Richtmyer v. Remsen*, 38 N. Y. (11 Tiff.) 206; S. C., 6 Trans. App. 203; *Hawk v. Thorn*, 54 Barb. 164; *McKee v. Judd*, 12 N. Y. (2 Kern.) 622; *Genet v. Howland*, 30 How. 360; S. C., 45 Barb. 560; *Grocers' National Bank v. Clark*, 32 How. 160; S. C., 48 Barb. 26; *Gould v. Gould*, 41 id. 654. The same rule applies to a right of action against a

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common carrier to recover the value of property intrusted to him (*Merrill v. Grinnell*, 30 N. Y. [3 Tiff.] 594; *Waldron v. Willard*, 17 N. Y. [3 Smith] 466); to a claim against an inn-keeper to recover money stolen from the trunk of a guest (*Stanton v. Leland*, 4 E. D. Smith, 88); to a claim under the statute requiring compensation for the death of a person by the wrongful act of another (*Quin v. Moore*, 15 N. Y. [1 Smith] 432); to a claim for fees and commissions belonging to a public officer, and against one who has wrongfully received the same (*Platt v. Stout*, 14 Abb. 178); to a claim upon a life insurance policy made in favor of the insured (*St. John v. American Mutual Life Ins. Co.*, 13 N. Y. [3 Kern.] 31); to a claim upon a fire insurance policy (*Mellen v. Hamilton Fire Ins. Co.*, 17 N. Y. [3 Smith] 609; *Fowler v. New York Indemnity Ins. Co.*, 23 Barb. 151); to a claim for an injury to personal property (*Merrick v. Brainard*, 38 Barb. 574); to a claim against another for procuring the sale of goods on false representations. *Johnston v. Bennett*, 5 Abb. N. S. 331; *Fried v. N. Y. Central R. R. Co.*, 25 How. 285. See *Haight v. Hayt*, 19 N. Y. (5 Smith) 464; *French v. White*, 5 Duer, 254; *Byxbie v. Wood*, 24 N. Y. (10 Smith) 607. In the case of *Zabriskie v. Smith*, 13 N. Y. (3 Kern.) 322, where a contrary opinion is expressed, the provisions of the Revised Statutes were evidently overlooked. *Id.* So a cause of action for fraud in the purchase and sale of real estate survives to and against the personal representatives of a deceased party to the transaction, and is therefore assignable. *Haight v. Hayt*, 19 N. Y. (5 Smith) 464; *Graves v. Spier*, 58 Barb. 349.

Illustrations of assignable rights of action arising upon contracts or upon torts might be multiplied, all tending to show that, as a general rule, all rights of action are assignable, and that an action is maintainable thereon in the name of the assignee, and, that the cases in which a right of action may not be assigned, and in which the action must be maintained by the party holding the legal title, are mere exceptions to the rule. *Meech v. Stoner*, 19 N. Y. (5 Smith) 26 (29). See Wait's Code, 115 to 121.

d. *Where the right of action is not assignable* A right of action which is not assignable, must be brought by the original owner of the right, or not at all. It cannot be brought by his personal representatives, because the test of the assignability of a chose in action is its legal capacity to descend, on the death of the party, to his legal representatives. Nearly the

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entire class of non-assignable rights of action are those which spring from purely personal torts, and which do not affect the estate of the party injured. It is in such cases only that the right of action dies with the party. *Brooks v. Hanford*, 15 Abb. 342; *Purple v. Hudson R. R. Co.*, 1 Abb. 33; S. C., 4 Duer, 74; *Hodgman v. Western Railroad Corporation*, 7 How. 492; *Butler v. N. Y. & Erie R. R. Co.*, 22 Barb. 110; *McKee v. Judd*, 12 N. Y. (2 Kern.) 622; *Mackey v. Mackey*, 43 Barb. 58.

Under this rule, all actions of slander, libel, assault and battery, false imprisonment, crim. con., seduction, breach of promise of marriage, and all injuries to the person, personal feelings or character, are non-assignable, and must be enforced in the name of the original party or not at all. *Butler v. N. Y. & E. R. R.*, 22 Barb. 110; *Chamberlain v. Williamson*, 2 Maule & Selw. 408; *Meech v. Stoner*, 19 N. Y. (5 Smith) 26 (29). To this general rule there is one apparent statutory exception: "Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. Laws 1847, ch. 450. Every such action shall be brought by, and in the names of the personal representatives of such deceased person. And the amount recovered in every such action shall be for the exclusive benefit of the husband or widow, and next of kin of such deceased person, and shall be distributed to such husband or widow and next of kin, in the proportion now provided by law in relation to the distribution of personal property of persons dying intestate." Laws 1847, ch. 450, as amended by Laws 1870, ch. 78. The interest of the party entitled to receive the damages recovered in such an action is assignable. *Quin v. Moore*, 15 N. Y. (1 Smith) 432. But it is not clear that the assignee, or the original owner of that interest, could maintain an action against the wrong-doer, unless such owner was also the personal representative of the deceased. *Whitford v. Panama R. R. Co.*, 23 N. Y. (9 Smith) 465 (489); *McMahon v. Mayor, etc., of N. Y.*, 33 N. Y. (6 Tiff.)

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642. By the amendment of 1870, chapter 78, the husband is entitled to recover damages for the killing of the wife, in the same manner that she may recover damages for the killing of the husband. This change in the law renders obsolete those cases which held that the husband could not recover damages in case the killing of the wife was instantaneous. See *Green v. H. R. R. Co.*, 2 Keyes, 294 ; 28 Barb. 9 ; 16 How. 230 ; *Lucas v. N. Y. Central R. R. Co.*, 21 Barb. 245.

The right of action to cancel or avoid any instrument on the ground of usury, or to have the same surrendered, is a personal privilege confined to the borrower and his personal representatives, and cannot be assigned. *Boughton v. Smith*, 26 Barb. 635 ; *Draper v. Trescott*, 29 Barb. 401.

A right of action cannot be assigned by a person under sentence of imprisonment in a State prison, as a sentence of imprisonment in the State prison for any term less than for life suspends the civil rights of the person so sentenced during the term of such imprisonment. *Miller v. Finkle*, 1 Park. 374 ; and see 2 R. S. 701, § 19.

A license, which is in its nature a *personal trust*, is not assignable. *Blackwell v. Wiswall*, 14 How. 257 (260) ; S. C., 24 Barb. 355.

So a debt due by a party to himself and another cannot be assigned by the debtor. *Van Scoter v. Lefferts*, 11 Barb. 140. Thus, where a member of a copartnership assigns all his interest in and to the property, goods, wares, merchandise and debts belonging to the firm, a debt owing by the assignor to the firm will not pass by the assignment. *Ib.* See Wait's Code, 115 to 121.

e. Principal and agent. At common law it was a general rule in regard to parties to actions, that every action on an express contract must be brought in the name of the person to whom the engagement violated was originally made, unless the instrument was in its nature transferable, as in the case of a negotiable note. *Newcomb v. Clark*, 1 Denio, 226 ; *Erickson v. Compton*, 6 How. 471. Thus, where an agent made a contract in his own name but for the benefit of his principal, the agent alone could bring the action for a breach of the contract. When the rule of equity was substituted for the rule at common law, and the Code required that every action should be brought in the name of the real party in interest, the principal became the proper party plaintiff, although not mentioned in the contract upon which

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suit was brought. The courts, however, gave a liberal construction to the exception to the general rule contained in sections 111, 113 of the Code, and declared that any person who acts in trust for, or in behalf of another, is, in fact, a trustee of an express trust; and that factors and other mercantile agents who contract in their own names, but for the benefit of and without disclosing their principals are properly included in that term. *Grinnell v. Schmidt*, 2 Sandf. 706; S. C., 3 Code R. 19; 8 N. Y. Leg. Obs. 197. By the amendment of the Code in 1851, an explanatory clause was added to section 113, which provided that a trustee of an express trust, within the meaning of that section, must be construed to include a person with whom or in whose name a contract is made for the benefit of another. This amendment was probably intended to give to the original section, in express terms, the same construction that had been given to it by the superior court. *Brown v. Cherry*, 38 How. 352; S. C., 56 Barb. 635. Under the Code as it now stands, it is well established that the old rule at common law and in equity have, in effect, been thoroughly blended, and that where a contract has been made by an agent in his own name, but for the benefit of his principal, the latter may sue upon the contract in his own name or in the name of his agent at his election. *Erickson v. Compton*, 6 How. 471; *Morgan v. Reid*, 7 Abb. 215; *Rowland v. Phalen*, 1 Bosw. 43; *Union India Rubber Co. v. Tomlinson*, 1 E. D. Smith, 364; *Brown v. Cherry*, 38 How. 352; S. C., 56 Barb. 635. So an agent may maintain an action in his own name upon a contract in which he has disclosed the name of his principal, and his representative character as agent, and although he was not personally bound by the contract, and although the promises therein contained were not to him personally but in his official or representative character. The agent is, in this case, also a trustee of an express trust within the meaning of section 113 of the Code. *Considerant v. Brisbane*, 22 N. Y. (8 Smith) 389; *Freeman v. Fulton Fire Insurance Co.*, 14 Abb. 398 (406); S. C., 38 Barb. 247; *Reilly v. Cook*, 13 Abb. 255 (258); S. C., 22 How. 93.

The mere fact that an agent may maintain an action as trustee of an express trust does not render it necessary that he should do so to the exclusion of the right of the principal (*Union India Rubber Co. v. Tomlinson*, 1 E. D. Smith, 364); and the authorities already cited clearly show that the right of

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the agent is not merged in the right of his principal. The action may be commenced in the name of the contracting party under the common-law rule, or may be brought in the name of the party holding the beneficial interest under the rule in equity. But when a choice is to be made between the form of proceedings at law or in equity, that one is to be preferred which is the most direct, consistent and comprehensive; and, in this respect, the rule of equity is less technical and is preferable to the rule at law. *Grinnell v. Buchanan*, 1 Daly, 538 (547). But while principal or agent may either of them maintain an action, they cannot both sue at the same time. 2 Wait's Law and Prac. 267.

Section 2. Foreign governments.

a. When a foreign government may be plaintiff. The right of a foreign government to sue in the courts of England was once a matter of serious doubt, but has since been recognized by the highest courts in the land. *Barclay v. Russell*, 3 Ves. 431; *Nabob of the Carnatic v. East India Co.*, 1 id. 371; *Hullett v. King of Spain*, 2 Bligh, N. S. 31; S. C., 1 Dow and Clark, 169; 1 Clark & Fin. 333; *King of Spain v. Machado*, 4 Russell, 225. So by the constitution of the United States, foreign States are expressly authorized to sue in the courts of the United States. Const. U. S., art. 3, § 2.

The right of a foreign government to sue in the courts of this State has been authoritatively settled by the State courts, and was held to be so plainly a right that a denial of it might be deemed a just cause of war. *Republic of Mexico v. Arangoiz*, 5 Duer, 634; 11 How. 576; affirming S. C., id. 1. The only limit or condition to the exercise of this right is that the government seeking relief through the courts of this State shall be one whose independence and sovereignty as such are acknowledged by the federal government, and that the two governments shall be at peace with each other. *Ib.* And see *City of Berne in Switzerland v. Bank of England*, 9 Ves. 347; *Dolder v. Bank of England*, 10 id. 353; *Dolder v. Lord Huntingfield*, 11 id. 283.

Section 3. States.

a. When a State may be plaintiff in the courts of another State. The constitution of the United States permits the several States of the Union to appear as plaintiff in the supreme court of the United States either against another State or against a citizen thereof. Const. U. S. art. 3, § 2. But the jurisdiction of

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the supreme court of the United States of a suit brought by a State against the citizen of another State, is not exclusive but concurrent with that exercised by a State court; and it is well settled that the several States of the Union may sue in their respective corporate names in the courts of this State. *Delafield v. State of Illinois*, 2 Hill, 159; S. C., 8 Paige, 527; *Teall v. Felton*, 1 N. Y. (1 Comst.) 537; S. C. affirmed, 12 How. (U. S.) 284. And see *Hines v. State of North Carolina*, 10 Smedes & Marsh, 529. It is questionable whether the federal courts have any jurisdiction of suits prosecuted by a State, except where the parties on both sides are States. *Delafield v. State of Illinois*, 2 Hill, 159.

b. When a State may be plaintiff in its own courts. The right of a State to sue in its own courts, for the protection of a right or the redress or prevention of a wrong, is substantially the same as is given to individuals in similar cases. Actions brought by the State are in the name of the people, and are prosecuted by the attorney-general in the same manner as in actions by private citizens, except when some special statute changes the rule. See 1 R. S. 179, 180; 2 id. 553, §§ 13, 14; id. 619, § 38.

Section 4. Counties.

a. How counties may sue. The Revised Statutes provide that counties of the State must sue and be sued in the name of the board of supervisors, except where county officers shall be authorized by law to sue in their name of office for the benefit of the county. 1 R. S. 384; *Hill v. Board of Supervisors of Livingston county*, 12 N. Y. (2 Kern.) 52 (63); *Brady v. Supervisors of New York*, 2 Sandf. 460. See § 7, *post*. See, also, § 5, *post*.

Section 5. Towns.

a. How a town may sue. Whenever any controversy or cause of action shall exist between any towns of this State, or between any town and an individual or corporation, such proceedings shall be had either at law or in equity for the purpose of trying and finally settling such controversy, and the same shall be conducted in like manner and with like effect as in other suits or proceedings of a similar kind between individuals and corporations. 1 R. S. 356. These provisions of the statute are substantially the same as those in relation to counties. 1 R. S. 384. In all such suits and proceedings the town shall sue and be sued by its name, except where town officers shall be authorized by law

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to sue in their name of office for the benefit of the town. 1 R. S. 357.

A town may maintain an action to restrain the negotiation of bonds, issued in the name of the town, by a person assuming to act as its commissioner, in payment of subscriptions to the stock of a railroad company, when such person is not legally authorized to act in the matter. *Town of Duaneburgh v. Jenkins*, 46 Barb. 294; 40 id. 574. See *Howland v. Eldredge*, 43 N. Y. (4 Hand) 457.

But a town cannot maintain an action, in its corporate character, to set aside a contract made between its supervisor and commissioners of highways, and a plankroad company, as to the use of a public highway. *Town of Galen v. Clyde & Rose Plankroad Co.*, 27 Barb. 543. Nor can it maintain an action against a commissioner of highways who has received and paid over to tax payers such moneys as were illegally taxed, and collected of them by the town collector. *Gailor v. Herrick*, 42 Barb. 79.

Section 6. Corporations.

a. Generally speaking, all corporations incorporated by or under the provisions of the laws of this State, may sue and be sued by their corporate name, in the same manner as natural persons. There must, however, be an exception made to the general application of the rule, in the case of municipal corporations. The manner in which States, counties and towns may sue has been briefly pointed out in the preceding sections. The manner in which cities and villages may sue or be sued is generally specified in the charter or act under which they are incorporated. In the absence of any statutory provisions as to the manner in which suits must be brought in such cases, the action should be commenced by the corporation in its corporate name. See Laws of 1870, ch. 291, title 1, § 17.

b. *Foreign corporations.* A foreign corporation, created by the laws of any other State or country, may prosecute in the courts of this State in the same manner as domestic corporations, upon giving security for the payment of the costs of the suit. 2 R. S. 457 (477). *Lombard Bank v. Thorp*, 6 Cow. 46; *Western Bank v. City Bank of Columbus*, 7 How. 238; *Mutual Benefit Life Insurance Co. v. Davis*, 12 N. Y. (2 Kern.) 569; *Persse & Brooks Paper Works v. Willet*, 14 Abb. 119. But it is further provided, that a foreign corporation shall not be authorized to maintain any action, founded upon any act forbidden to be done

Corporations.

by any corporation or association of individuals, without express authority of law. 2 R. S. 458. A foreign corporation should sue in its corporate name. *Silver Lake Bank v. North*, 4 Johns. Ch. 370.

But an agent of a foreign corporation may maintain an action in his own name, on contracts purporting on their face to be made with him as the executive agent of such corporation. *Considerant v. Brisbane*, 22 N. Y. (8 Smith) 389. And any agent authorized by a foreign corporation to bring an action in its behalf, may bring such action in his own name. *Myers v. Machado*, 14 How. 149; S. C., 6 Abb. 178. It is only upon giving security for the payment of costs, that a foreign corporation is entitled to all the rights, in the courts of this State, that are extended by statute to domestic corporations. 2 R. S. 457 (477). But the filing of such security is not a condition precedent to the right to sue; and a failure to file this security before the commencement of the action will not affect the jurisdiction of the court. It is an irregularity, merely, that will entitle the defendant to have the suit dismissed on prompt application to the court. But, if the objection is not raised before judgment, the irregularity will be deemed waived. *Persse & Brooks Paper Works v. Willet*, 14 Abb. 119; *Merchants' Bank v. Mills*, 3 E. D. Smith, 210; *Hartford Quarry Co. v. Pendleton*, 4 Abb. 460. The defect may also be cured by filing the proper undertaking, after notice of motion to set aside the plaintiff's proceedings upon payment of the costs of the motion. *Bank of Michigan v. Jessup*, 19 Wend. 10.

The undertaking may be in the following form:

KNOW ALL MEN by these presents, that we, A. B. and C. D., (), are held and firmly bound unto E. F., in the sum of two hundred and fifty dollars, to be paid to the said E. F., his executors, administrators or assigns, for which payment well and truly to be made we jointly and severally bind ourselves, our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated the day of , 187 .

WHEREAS, the (), a foreign corporation, created by the laws of the State of (), is about to commence an action in the () court, against E. F., for the recovery of (give the nature of the cause of action).

Associations.

THE CONDITION of this obligation is such that, if the said (), or their successors, shall, on demand, pay to the said E. F., his executors, administrators or assigns, all such costs as may be awarded to the said E. F., in such action, then this obligation to be void ; otherwise, to remain in full force.

(Signatures and seals.)

Sealed and delivered, }
in the presence of }

(Subscribing witnesses.)

(Acknowledgment or proof.)

The justification of sureties, in a bond of security for costs, is unnecessary unless they are excepted to. *Washburne v. Langley*, 16 Abb. 259.

c. Domestic corporations. It is a general rule that a corporation must sue in its own name in the same cases in which a similar action could be maintained by an individual. In this respect the law makes no distinction between natural and artificial beings. Thus actions by a religious society, incorporated under the general statute, must be brought in its corporate name, and not in the name of its trustees. *People v. Fulton*, 11 N. Y. (1 Kern.) 94 ; *Bundy v. Birdsall*, 29 Barb. 31 ; *Lowenthal v. Wiseman*, 56 id. 490. And where an action is properly commenced by a corporation in its corporate name, it will not abate, but may be continued in the same name after the dissolution of the corporation, and without a special application to the court. *New York Marbled Iron Works v. Smith*, 4 Duer, 362 ; *Nimmons v. Tappan*, 2 Sweeny, 652. But an individual banker, carrying on business under the general banking law, should not sue as a corporation, although he may transact business under a corporate name. *Codd v. Rathbone*, 19 N. Y. (5 Smith) 37 ; *Bank of Havana v. Magee*, 20 N. Y. (6 Smith) 355. Such action should be brought in the name of the individual, although a failure to do so will be but a formal error. *Ib.*

Section 7. Associations.

a. In general. It is provided by statute that any joint-stock company or association, consisting of seven or more shareholders, or associates, may sue and be sued, in the name of the president or treasurer for the time being of such joint-stock company

 Persons authorized by statute to sue.

or association. Laws of 1849, ch. 258. This provision of the statute was extended by a subsequent enactment to any company or association composed of not less than seven persons, who are owners of, or have an interest in, any property, right of action or demand, jointly or in common, or who may be liable to any action on account of such ownership or interest. Laws of 1851, ch. 455; *Tibbetts v. Blood*, 21 Barb. 650; *De Witt v. Chandler*, 11 Abb. 459; *Bridenbecker v. Hoard*, 32 How. 289; *Heath v. President of Gold Exchange*, 7 Abb. N. S. 251; S. C., 38 How. 168. See *Austin v. Searing*, 16 N. Y. (2 Smith) 112. But these provisions of the statutes do not extend to fire companies so as to authorize them to sue in the name of their foreman. *Masterson v. Botts*, 4 Abb. 130. Neither are they applicable to corporations generally. *New York Marbled Iron Works v. Smith*, 4 Duer, 362. But an association formed under the general banking law, although a *quasi* corporation, may maintain an action either in the name of its president, or in the name used in transacting its business. *East River Bank v. Judah*, 10 How. 135; *Leonardsville Bank v. Willard*, 25 N. Y. (11 Smith) 574; affirming S. C., 16 Abb. 111; *People v. Olmstead*, 45 Barb. 644 (647). A familiar illustration of the general character of an association entitled to sue under the statute may be found in the case of *Bridenbecker v. Hoard*, 32 How. 289.

Section 8. Persons authorized by statute to sue.

a. In general. The Code excepts, from the general provision that every action must be brought in the name of the real party in interest, actions brought by persons expressly authorized by statute to sue. Code, § 113. This exception includes actions brought by the supervisors of a county; by the loan officers and commissioners of loans of a county; by superintendents of the poor; by supervisors of towns; by overseers of the poor of the several towns; by commissioners of common schools and commissioners of highways of the several towns; by trustees of school districts; and by trustees of gospel and school lots; upon any contract lawfully made with them or their predecessors in their official character; to enforce any liability, or any duty enjoined by law, to such officers or the body which they represent; to recover any penalties or forfeitures given to such officers or bodies whom they represent; and to recover damages for any injuries done to the property or rights of such officers, or the bodies represented by them: 2 R. S. 473, § 92.

Persons authorized by statute to sue — Public officers.

The contracts, upon which such officers are authorized to sue, are not contracts made *by* these officers in behalf of their towns, but *with* them, or, in other words, in their names. The statute above cited intended to provide for cases where these officers, in the performance of their appropriate official duties, should take from others contracts running in terms to such officers by their names of office. *Palmer v. Fort Plain and Cooperstown Plank Road Co.*, 11 N. Y. (1 Kern.) 376.

b. Actions by public officers. The actions which are provided for in the statute last cited may be brought by the officers in their own names, with the addition of the names of their respective offices, notwithstanding the contract or obligation on which the same are founded may have been made with or to any predecessor of such officers in their individual names or otherwise, and notwithstanding any right of action may have accrued previous to the time when the officers commencing such suit entered upon the duties of their office. 2 R. S. 473, § 93; *Gould v. Glass*, 19 Barb. 179; *Fowler v. Westerloelt*, 40 id. 374; S. C., 17 Abb. 59; *Smith v. Levinus*, 8 N. Y. (4 Seld.) 472. Thus suits may be brought by commissioners of highways in the names of A., B., C., etc., Commissioners of Highways (*Commissioners of Highways of Cortlandville v. Peck*, 5 Hill, 215); or, a school district may sue in the names of the persons comprising the board of trustees, adding thereto the words, "Trustees of District Number ——" (*Winchester v. McKee*, 4 Alb. L. J. 138); but it is advisable to prefix the word *as* to the name of the office in order to show that the claim is made by the officer and not by the individual. See *Gould v. Glass*, 19 Barb. 179; *Smith v. Levinus*, 8 N. Y. (4 Seld.) 472.

In an attachment suit, where property or money has been fraudulently transferred by a debtor, to a third person, for the purpose of hindering, delaying or defrauding the creditors of such debtor, a sheriff having an attachment against the debtor may levy upon the property transferred and contest the right of the person in possession, and prove the transfer fraudulent. *Rinchey v. Stryker*, 28 N. Y. (1 Tiff.) 45; *Lanning v. Streeter*, 57 Barb. 33 (44). The sheriff may bring this action in his own name. Independent of any express authority conferred by statute, when any public office is instituted by the legislature, an implied authority is conferred on the officer to bring all suits as incident to his office which the proper and faithful discharge of his office

 Actions for penalties — Executors and administrators.

require. *Overseers of Pittstown v. Overseers of Plattsburgh*, 18 Johns. 406 (418); *Clarissy v. Metropolitan Fire Department*, 7 Abb. N. S. 352; S. C., 1 Sweeny, 224; *People v. Supervisors of N. Y.*, 32 N. Y. (5 Tiff.) 473 (477); *Duntz v. Duntz*, 44 Barb. 459.

c. In actions for penalties. Actions for penalties under the act to suppress intemperance and to regulate the sale of intoxicating liquors, should be brought in the name of the board of commissioners of excise, and not in the names of the persons composing the board. Laws of 1857, ch. 628, § 22; *Pomroy v. Sperry*, 16 How. 211; *Board of Excise v. Doherty*, id. 46. But if the action is brought according to the general rule governing actions brought by public officers, and the names of the individual members of the board are given, with the name of their office annexed, the action will be sufficiently brought in the name of the board to conform to the requirements of section 22 of that act. *Hait v. Benson*, 18 How. 302.

Actions for penalties under the act to re-organize the wardens' office of the port of New York, should be brought in the name and title of the port wardens of the port of New York. Laws of 1857, ch. 405, § 6.

Actions for penalties under the harbor masters' act of 1860 must be prosecuted under the name of the captain of the port. Laws of 1860, ch. 436. Actions for penalties under the pilotage laws must be brought in the name of the board of commissioners of pilots. Laws of 1857, ch. 671, § 18, as amended by Laws of 1858, ch. 226.

Where a statute grants a pecuniary penalty or forfeiture to a party aggrieved by the act or omission of another, and fails, in terms, to provide in whose name the action for its recovery should be brought, the party injured or aggrieved may bring the action in his own name. *Thompson v. Howe*, 46 Barb. 287 (289); *Conley v. Palmer*, 2 N. Y. (2 Comst.) 182; affirming S. C., 4 Denio, 374; *Boyce v. Higgins*, 14 C. B. 1; *Hollis v. Marshall*, 2 Hurlst. & Norm. 755. See 2 R. S. 480 (502), Edm. ed.

Section 9. Persons in a representative character.

a. Executors and administrators. The right of executors and administrators to sue in their own names, without joining with them the persons for whose benefit the action is prosecuted, is given by section 113 of the Code. The person thus vested with a representative character may sue either in his own name, or as executor upon a note given to him as executor, for a debt due

to his testator or to the estate. *Merritt v. Seaman*, 6 N. Y. (2 Seld.) 168; *Mowry v. Adams*, 14 Mass. 327; *Talmage v. Chapel*, 16 id. 73; *Biddle v. Wilkins*, 1 Pet. 692; *Bright v. Currie*, 5 Sandf. 433; S. C., 10 N. Y. Leg. Obs. 104. But, although the executor may elect in what capacity he will sue, an action brought by him, in his individual capacity, is, in general, most appropriate. *Ib.* See *Grinnell v. Buchanan*, 1 Daly, 538.

b. Trustees of an express trust. Another important exception to the general rule of the Code, that all actions must be prosecuted in the name of the real party in interest, is in relation to actions brought by a trustee of an express trust. The actions embraced in this classification include actions by receivers, executors, administrators, committees of lunatics, etc., which, for convenience, will be treated separately. The Code provides that a trustee of an express trust shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another, and that such trustee may sue without joining with him the person for whose benefit the action is prosecuted. Code, § 113. Thus an auctioneer, who, in his own name, sells goods for a third person, is a trustee of an express trust, and may sue in his own name to recover the price of the goods sold, or the damages resulting from the non-performance of the contract entered into by the vendee. *Bogart v. O'Regan*, 1 E. D. Smith, 590; *Minturn v. Main*, 7 N. Y. (3 Seld.) 220; *Brown v. Cherry*, 38 How. 352 (359); S. C., 56 Barb. 635. So where a bond is given to "the people of the State of New York" for the benefit of others, an action may be maintained upon it by the people as trustees of an express trust. *People v. Norton*, 9 N. Y. (5 Seld.) 176. And, it is a general rule, that a suit to enforce a trust can only be maintained by the trustee, or the *cestui que trust*. As against a third person, a trustee is the proper party to bring the action. As against the trustee, the suit can only be maintained by the *cestui que trust*. *New York Female Association v. Beekman*, 21 Barb. 565.

c. Receivers, committees of lunatics, etc. Receivers and committees of lunatics and habitual drunkards, appointed by any order or decree of the supreme court, may sue in their own names for any debt, claim or demand transferred to them, or to the possession and control of which they are entitled as such receiver or committee. 3 R. S. (5th ed.) 135, § 11; Laws of 1845, ch. 112, § 2; *Davis v. Carpenter*, 12 How. 287; *Person v. War-*

 Persons out of the jurisdiction of the court.

ren, 14 Barb. 488. In their official capacity they act as trustees of an express trust, and come within the exception of section 113 of the Code. *Ib.* See *Thomas v. Bennett*, 56 Barb. 197 (201).

But, this exceptional right to sue in the place of the real party in interest does not extend to receivers appointed by the courts of another State or country. No case can be found in which a receiver has been permitted to sue in a foreign jurisdiction for the property of a debtor. *Booth v. Clark*, 17 How. (U. S.) 322. And the right of a foreign receiver to sue in his own name in the courts of this State has been authoritatively denied. *Hope Mutual Life Insurance Co. v. Taylor*, 2 Rob. 278. But, although a foreign receiver cannot sue in the courts of this State *as a matter of right*, the privilege has never been denied except where his claim came in conflict with the rights of creditors in this State. But the courts will not sustain the lien of foreign assignees and receivers, in opposition to a lien created by attachment under the laws of this State; or, in other words, the courts will decline to extend their wonted courtesy so far as to work detriment to citizens who have been induced to give credit to the foreign insolvent. *Runk v. St. John*, 29 Barb. 585. See *Lombard Bank v. Thorp*, 6 Cow. 46; *Hoyt v. Thompson*, 5 N. Y. (1 Seld.) 320. It will be proper, however, to commence an action in the name of the *cestui que trust*, instead of in the name of the trustee in cases where there may be a conflict between the rights of the creditors in this State and the claims of those represented by the foreign receiver. See *Hope Mutual Life Insurance Co. v. Taylor*, 2 Rob. 278.

Section 10. Persons out of the jurisdiction of the court.

a. Non-residents. The fact that a person, having a claim against a citizen of this State, is a non-resident, does not affect his right of action thereon when the claim accrues to him in his individual capacity. The only distinction made in this State, as to the relative rights of residents and non-residents to maintain an action in any court, is in relation to security for costs, such security being required when the action is brought by one against whom the court could not enforce a judgment in case he should fail to establish his right to recover. *President, etc., of the Bank of Commerce v. Rutland & Washington R. R. Co.*, 10 How. 1; *Persse and Brooks Paper Works v. Willet*, 14 Abb. 119; *Tyrone and Lock Haven R. R. Co. v. Schenck*, 18 How. 275. This distinction extends to plaintiffs residing beyond the jurisdiction of

Who may not sue — Aliens.

courts of limited jurisdiction, as well as to plaintiffs residing in another State. Thus a plaintiff residing beyond the jurisdiction of the superior court of the city of New York, but within the limits of this State, may be required, on commencing an action in that court, to give security for the costs of the action. *Bolton v. Taylor*, 3 Rob. 647; S. C., 18 Abb. 385; *Gardner v. Kelly*, 2 Sandf. 632; S. C., 1 Code R. 120; *Hicks v. Payson*, 7 Abb. 326. But this distinction does not extend beyond this requirement. The rights of aliens to sue in the courts of this State may be found stated in the following article.

ARTICLE II.

WHO MAY NOT SUE.

Section 1. Aliens.

a. In general. By the old law of England no alien, whether friend or enemy, could sue in the English courts. The necessities of trade, however, gradually caused this restriction to be regarded with disfavor, and the former restrictions were removed so far as to allow aliens to sue for a personal demand. There was, however, a clear distinction made between the rights of alien friends and alien enemies. Alien enemies were never granted the right to sue on demands accruing to them in their own right. *Brandon v. Nesbitt*, 6 Term. 23; *McConnell v. Hector*, 3 Bos. & Pul. 113; Co. Litt. 129, *b*; *Sparenburgh v. Banantyne*, 1 Bos. & Pul. 163. This rule has been substantially adopted in this country. The mere circumstance of residing in a foreign country which is at war with this country, and of carrying on trade there, is sufficient to constitute one an alien enemy who would not otherwise be so considered. Thus a citizen of the United States, residing in the enemy's country, is as clearly an alien enemy, in respect to his capacity to sue, as one born and residing within the territory of a hostile nation. *Albrecht v. Sussman*, 2 Ves. & B. 323; *McConnell v. Hector*, 3 Bos. & Pul. 113; *Baglehole, Ex parte*, 18 Ves. 525; *Arnold v. United Ins. Co.*, 1 Johns. Cas. 363. But aliens who are residents of the United States at the breaking out of a war with their native country, or who come to reside in this country by a presumed permission, after a declaration of war, may sue and be sued as in time of peace. *Clarke v. Morey*, 10 Johns. 69. A

 Aliens — Convicts — Foreign executors.

state of actual war may exist without a formal declaration of it by either party, and this is true both of a civil and a foreign war. A civil war exists whenever the course of justice is interrupted by revolt, rebellion or insurrection, so that the courts cannot be kept open. *Swinerton v. Columbia Ins. Co.*, 37 N. Y. (10 Tiff.) 174, 178; *Robinson v. International Life Ass. Co.*, 42 N. Y. (3 Hand) 54, 61. The obligation of observing the common laws of war exists wherever a civil war exists, as well as where two recognized nationalities are at war with each other, and a resident of a State in rebellion against the general government is subject to the same disabilities and liabilities as an alien enemy. Thus, any individual who voluntarily remained in the confederate States after the civil war had commenced, became incapable of prosecuting an action in the courts of this State. *Sanderson v. Morgan*, 39 N. Y. (12 Tiff.) 231; affirming 25 How. 144; *Bonneau v. Dinsmore*, 23 id. 397.

b. In real actions. By the rule of the old law of England, an alien friend might maintain personal actions, but could not maintain real or mixed actions. Co. Litt. 129, *b*. Under the law as it then existed, no alien except a merchant, could have land at all, and he was restricted to a house, for the law gave him the privilege of a habitation only as necessary to trade. Much of the rigor of the common law has been abated, and under the laws of this State an alien may hold land conveyed to him as against every one but the State, and until office found, can maintain actions for its recovery. *Bradstreet v. Supervisors of Oneida Co.*, 13 Wend. 546; *Ford v. Harrington*, 16 N. Y. (2 Smith) 285 (294). See *Overing v. Russell*, 32 Barb. 263, 265.

Section 2. Convicts. A sentence of imprisonment in a State prison, for any term less than for life, suspends all the civil rights of the person so sentenced, and forfeits all public offices and all private trusts, authority or power during the term of such imprisonment. 2 R. S. 701. This of course deprives the person so convicted of all right to commence or to maintain an action in his own right in the courts of this State. See *Miller v. Finkle*, 1 Park. Cr. 374.

Section 3. Foreign executors. It is well settled that a party cannot sue or defend in the courts of this State, as executor or administrator under the authority of a foreign court. Letters of administration are valid only within the State where they are granted, and before the courts of this State can recognize the

Who may not sue alone — Infants.

personal representative of a deceased non-resident, he must be clothed with authority derived from the laws of this State. *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Parsons v. Lyman*, 20 N. Y. (6 Smith) 103; *Vroom v. Van Horne*, 10 Paige, 549; *Morrell v. Dickey*, 1 Johns. Ch. 153. But although a foreign executor cannot sue, as such, in the State courts, the disability does not extend to his assignee, who may sue in his own name. The disability does not attach to the subject of the action, but to the person of the plaintiff. *Petersen v. Chemical Bank*, 32 N. Y. (5 Tiff.) 21; S. C., 29 How. 240; *Middlebrook v. Merchants' Bank*, 3 Keyes, 135.

ARTICLE III.

WHO MAY NOT SUE ALONE.

Section 1. Infants.

a. How infants must sue. Under the former practice an infant plaintiff could only sue by a next friend, while an infant defendant appeared by guardian. Under the Code the rule is changed, and an infant party, whether plaintiff or defendant, must appear by a guardian specially appointed for the purposes of the action. Code, § 115; *Hoftailing v. Teal*, 11 How. 188; *Freyberg v. Pelerin*, 24 id. 202. There is, however, one exception to this general rule. Where an infant wife joins with her husband as plaintiff in an action in which her separate estate is not concerned, the appointment of a guardian *ad litem* is unnecessary. *Cook v. Rawdon*, 6 How. 233; S. C., 1 Code R. N. S. 382. The effect of a disregard of this rule is to entitle the defendant to move to set aside the summons and complaint for irregularity. *Hoftailing v. Teal*, 11 How. 188; *Freyberg v. Pelerin*, 24 id. 202. But although an *action* may not be commenced or prosecuted before the appointment of a guardian *ad litem*, there are certain statutory proceedings that may be instituted by the natural guardian of an infant. Thus, a petition for the sale of an infant's real estate may be presented by the infant's natural guardian, as the mother or uncle. *Matter of Whitlock*, 32 Barb. 48; S. C., 19 How. 380; 10 Abb. 316; *O'Reilly v. King*, 2 Rob. 587; S. C., 28 How. 408.

Although an infant may not sue without a guardian, it does not follow that the general guardian may not sue alone. On the contrary, a general guardian, appointed by a surrogate,

Idiots, lunatics, etc. — Married women — Joinder of plaintiffs.

stands in the position of a trustee of an express trust, and may maintain an action in his own name, as such guardian, to recover a debt due to his wards. *Thomas v. Bennett*, 56 Barb. 197. See *White v. Parker*, 8 id. 52.

Section 2. Idiots, lunatics, etc.

a. How an idiot, lunatic or habitual drunkard may sue. Any person judicially declared an idiot, lunatic or habitual drunkard cannot sue alone. The action must be brought in the name of the idiot, lunatic or drunkard, by the committee having control of his estate; or such committee must maintain the action in his own name, as trustee of an express trust. *Crippen v. Culver*, 13 Barb. 424, 429; *Davis v. Carpenter*, 12 How. 287. It was the rule, before the Code, that the action must be maintained by the lunatic in his own name, in all cases not expressly provided for in the act of 1845. *McKillip v. McKillip*, 8 Barb. 552; *Laws of 1845*, ch. 112, § 2. This rule has no existence since the Code. *Person v. Warren*, 14 Barb. 488; *Thomas v. Bennett*, 56 id. 197, 201. See ch. 1, § 9, *c*, *ante*, 105.

Section 3. Married women.

a. When a married woman may not sue alone. In every action in which a married woman is a party plaintiff, her husband must be joined with her, except when the action concerns her separate estate, or is one between herself and husband. Code, § 114.

ARTICLE IV.

WHO MAY BE JOINED AS PLAINTIFFS.

Section 1. What interest will authorize a joinder of.

a. Plaintiffs. It was the old rule in equity that all persons materially interested in the subject of a suit, however numerous, ought to be made parties, in order that there might be a complete decree between all the parties having a material interest. The rule of the Code is, in effect, the embodiment of the old equity rule. It provides that all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in Title III. Code, § 117.

b. Nature of the interest. The general language of the Code furnishes no criterion by which to determine the nature and character of the interest necessary to authorize a joinder of

What interest will authorize a joinder of.

parties plaintiff. It was said, under the former practice, that there was no inflexible rule as to the joinder of parties in the court of chancery. *Murray v. Hay*, 1 Barb. Ch. 59. Under the rule of equity as adopted by the Code, the principle is equally true. The Code does not require that the parties to be joined as plaintiffs shall have a *joint*, or an *equal*, or even a *common*, interest, but simply an interest in the subject of the action, with a view of doing full justice and settling the rights of all parties in interest in one suit. *Loomis v. Brown*, 16 Barb. 325.

It is not a necessary qualification to the joinder of parties plaintiff that the relief sought by each should be identical in character and amount. Thus, in an action brought upon an injunction bond, the subject of the action is the damage of the plaintiffs arising out of the injunction, and although the damage to the one may have been greater than that to the others, the parties may, notwithstanding, be properly joined as plaintiffs (*Loomis v. Brown*, 16 Barb. 325); so judgment creditors, in cases of fraud in the original debtor, may unite in one action to detect and suppress the fraud, and to have the debtor's fund distributed according to the priority of their respective liens, or ratably, as the case may be (*Brinkerhoff v. Brown*, 6 Johns. Ch. 139; *Reed v. Stryker*, 12 Abb. 47; reversing S. C., 6 id. 109); so, also, different persons, owning separate tenements, injuriously affected by a nuisance, may join in a suit to restrain its continuance. *Peck v. Elder*, 3 Sandf. 126. So the several proprietors of different lands and mills, and of separate parts of a natural water-course, may unite in an action to restrain a third party from diverting the water from its natural channel. As the acts of the defendant were a common injury to all the complainants, there was such a common interest in the subject of the suits as to authorize them to join in one suit, although the injury which each sustained was separate and distinct. *Reid v. Gifford*, Hopk. 416. But these cases are exceptions to a general rule. As a general principle, several complainants having distinct and independent claims to relief against a defendant, cannot join in a suit for the separate relief of each. *Murray v. Hay*, 1 Barb. Ch. 59; *Wood v. Perry*, 1 Barb. 114. Thus, individual purchasers of distinct portions of the same estate, cannot jointly maintain an action to restrain the prosecution of separate actions of ejectment against each purchaser (*Wood v. Perry*, 1 Barb. 114); neither could they unite in one suit against such vendor to compel a specific

 What interest will compel a joinder of plaintiffs.

performance of the contract of sale, for each contract being separate and independent, each case must depend on its own peculiar circumstances (*Rayner v. Julian*, Dick. 877); it is only where there is one common interest among all, centering in the point in issue in the cause, that unconnected parties may be joined in a suit. *Ward v. Duke of Northumberland*, Anstr. 469, 477. It is not sufficient that the parties have a common interest in some one or more items in an account charged. They must have a common interest, not in a particular item or isolated charge in the bill, but in the point in issue in the cause. *Saxton v. Davis*, 18 Ves. 72; *Fellows v. Fellows*, 4 Cow. 682. See *Loomis v. Brown*, 16 Barb. 325. Thus where a firm is libeled by matter applying to the firm or to any of its members, in such a manner as to affect the business of the firm, then an action in the name of the firm may be maintained upon the ground that the injury extends to the business of the firm (*Taylor v. Church*, 8 N. Y. (4 Seld.) 452; reversing, 1 E. D. Smith, 279; 10 N. Y. Leg. Obs. 87); on the other hand, the members of a hose company cannot maintain an action, as such, for a libel against the members of the company, as there is no such community of pecuniary interest among the members as will admit of damage to them collectively. *Giraud v. Beach*, 3 E. D. Smith, 337. And in general, where there is a common liability and a common interest, a common liability in the defendants and a common interest in the plaintiffs, different claims to property, at least if the subjects are such as may without inconvenience be joined, may be united in one and the same suit. *New York & New Haven R. R. Co. v. Schuyler*, 17 N. Y. (3 Smith) 592 (606); *Morton v. Weil*, 11 Abb. 421; S. C., 33 Barb. 30; *Robinson v. Smith*, 3 Paige, 222, 231; *Grant v. Van Schoonhoven*, 9 id. 255; *Alston v. Jones*, 3 Barb. Ch. 397.

ARTICLE V.

WHO MUST BE JOINED AS PLAINTIFFS.

Section 1. What interest will compel a joinder of plaintiffs.

a. In general. As has been stated in the previous article, when parties have a *common* interest in the claim made in an action, they *may* be joined as plaintiffs; but when they have a *joint* interest in the claim, they *must* join in the suit. *McKen-*

Who must be plaintiffs — Partners, assignees, etc.

zie v. L'Amoureux, 11 Barb. 516. The Code provides that "of the parties to the action those who are united in interest must be joined as plaintiffs or defendants." Code, § 119. This was substantially a copy of one of the rules of the supreme court of the United States, and was in accordance with the practice in chancery. *McKenzie v. L'Amoureux*, 11 Barb. 516.

Under this rule joint tenants, co-trustees, partners, joint owners, or joint contractors, must be joined as plaintiffs, unless it should be in the exceptional case of a party refusing to join as plaintiff, or except in an action in which the rights of general and special partners are involved, or where the rights of tenants in common may be involved.

Where premises are leased in fee, reserving rent with a condition of reentry for non-payment of rent, the heirs of the lessor may maintain separate actions to recover in ejectment when the rent is not paid. *Cruger v. McLaury*, 41 N. Y. (2 Hand) 219; 51 Barb. 642. So when the lease is for years, one of the heirs may sue alone for his share of the rent. *Jones v. Felch*, 3 Bosw. 63; *Cole v. Patterson*, 25 Wend. 456.

b. Partners. Prior to the Code, a dormant partner was not a necessary party in an action at law to recover a partnership debt, except in those cases in which he was known as a party to the contract from which the debt arose. *Clarkson v. Carter*, 3 Cow. 84; *Platt v. Halen*, 23 Wend. 456. But this rule was changed by the Code, and under the present practice, every partner, active or dormant, open or secret, having any interest in the subject in controversy, is a necessary party plaintiff in an action for the recovery of a partnership debt founded upon a partnership contract, whether the relief sought is legal or equitable. *Secor v. Keller*, 4 Duer, 416. To this general rule there is one exception. Suits in relation to the affairs of a limited partnership may be brought by and against the general partners, without joining the special partners. 1 R. S. 766; Laws of 1864, ch. 43. See *Schulten v. Lord*, 4 E. D. Smith, 206. Where a suit is brought between two firms having a common partner, such partner may elect to become plaintiff or defendant, and the other partners may sue or defend without him. *Cole v. Reynolds*, 18 N. Y. (4 Smith) 76; Code, § 119. See *Kingsland v. Braisted*, 2 Lans. 17, 20.

c. Assignees and assignors. It is seldom necessary to join an assignor in an action brought by an assignee in respect to the

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property assigned. Thus, where a person makes an unconditional assignment of a mortgage, he is not a necessary party to an action of foreclosure. *Ward v. Van Bokkelen*, 2 Paige, 289; *Whitney v. McKinney*, 7 Johns. Ch. 144. But the rule is different where the assignor still retains a contingent interest in the thing assigned. Thus where a mortgage has been assigned as a security for a debt, the assignor has still such an interest in the mortgage as will render him a necessary party to the action of foreclosure. *Johnson v. Hart*, 3 Johns. Cas. 322; *Bard v. Poole*, 12 N. Y. (2 Kern.) 495.

The owner of a single and entire demand may assign all his interest in the same to different parties, or may assign a portion only and retain an interest in the original claim. In either case, each owner of an interest may maintain an action in equity to enforce his portion of the demand. But in such action the plaintiff must join the assignees of the other parts, and the assignor, if he still retains an interest. *Cook v. Genesee Mutual Ins. Co.*, 8 How. 514; *Field v. Mayor, etc., of New York*, 6 N. Y. (2 Seld.) 179. But while the defendant may require all assignees holding an unsatisfied interest to be joined, he cannot compel the joinder of one whose interest is already satisfied. *Ib.*

d. Tenants in common. In actions *ex delicto*, for injuries to personal property, joint tenants and tenants in common must join. *Bucknam v. Brett*, 22 How. 233; S. C., 35 Barb. 596; 13 Abb. 119; *Rice v. Hollenbeck*, 19 Barb. 664. So they must join in an action for damages to real estate. *De Puy v. Strong*, 37 N. Y. (10 Tiff.) 372; S. C., 4 Abb. N. S. 340; 4 Trans. App. 239; 3 Keyes, 603; *Austin v. Hall*, 13 Johns. 286; *Low v. Mumford*, 14 id. 426; *Decker v. Livingston*, 15 id. 479. So in actions for the use or hire of property owned by tenants in common, all the owners must be joined. *Coster v. New York and Erie R. R. Co.*, 3 Abb. 332; S. C., 6 Duer, 43; 5 id. 677. See *Donnell v. Walsh*, 33 N. Y. (6 Tiff.) 43; *Merritt v. Walsh*, 32 N. Y. (5 Tiff.) 685. See section 3 of this Article, as to actions for rent.

e. Husband and wife. Under the old common law, a wife could in no case sue alone. Under the Code and subsequent statutes, the few cases in which it is necessary for the husband and wife to join in an action form the exceptions to the general rule, that a wife may maintain an action alone where she might have maintained the same action if a *feme sole*. There are but few cases in which it is now necessary for husband and wife to

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join as plaintiffs. The Code provides that, when a married woman is a party, her husband must be joined with her, except that when the action concerns her separate property she may sue alone; or, when the action is between herself and husband, she may sue and be sued alone; and that in no case need she prosecute or defend by a guardian or next friend. Code, § 114. The exceptions cover nearly every case in which a married woman could be plaintiff. By the act of 1860, as amended in 1862, any married woman may, while married, sue and be sued in all matters having relation to her sole and separate property, in the same manner as if she were sole; and any married woman may bring and maintain an action in her own name, for damages against any person or body corporate, for any injury to her person or character, the same as if she were sole. Laws of 1860, ch. 90; Laws of 1862, ch. 172; Laws of 1871, ch. 219, § 1. In all actions concerning her separate property, the husband is an unnecessary party. *Ackley v. Tarbox*, 31 N. Y. (4 Tiff.) 564; *Palmer v. Davis*, 28 N. Y. (1 Tiff.) 242. It was formerly a rule, that in actions for the slander of a wife, if the words spoken were actionable *per se*, the action must be brought in the name of the husband and wife; but if the words spoken of the wife were only actionable on proof of special damages, the husband must sue alone. *Williams v. Holdredge*, 22 Barb. 396; *Klein v. Hentz*, 2 Duer, 633; *Beach v. Ranney*, 2 Hill, 309. See *Wilson v. Goit*, 17 N. Y. (3 Smith) 442. But the statutes above referred to have essentially changed the rights of the husband and wife, in respect to torts committed upon the person or character of the wife, and have made her the sole plaintiff in actions brought for them. Assaults and batteries and slanders are now a part of the separate estate of the wife, and, in respect to them, she is a *feme sole*. *Mann v. Marsh*, 35 Barb. 68; S. C., 21 How. 372. But where a lease is executed by both husband and wife, of land in which the wife has an estate for life, and where the lessee covenants in terms to pay rent to both, the husband and wife may be joined in an action for rent upon the lease. *Jacques v. Short*, 20 Barb. 269. So in an action for the partition and sale of real estate held in common, the husband and wife should join as plaintiffs. *Ripple v. Gilborn*, 8 How. 456. Under the Code, before the change in the law, as to the rights of married women, an action to recover real property of which the wife was the owner of the fee and the husband tenant by the curtesy initiate, the action

 Exceptions to general rule — Legatees, trustees, etc.

might properly have been brought in the name of the husband and wife. *Ingraham v. Baldwin*, 12 Barb. 9. But as the law now stands, an action of ejectment may be maintained by the wife in her own name, without joining her husband. *Darby v. Callaghan*, 16 N. Y. (2 Smith) 71.

f. Legatees, devisees and executors. In actions by devisees, for a specific performance of a contract for the sale of lands executed by their testator, the executor of the deceased is a necessary party and must be joined as plaintiff. *Adams v. Green*, 34 Barb. 176.

g. Trustee and cestui que trust. It is a general rule, that when a fund is in the hands of a trustee which he is bound to distribute to different parties in unequal proportions, all interested in the distribution are necessary parties to an action against the trustee. But when the sum that each is entitled to receive has been ascertained by a proceeding binding on the trustee, each may maintain an action for his proportionate share. *General Mutual Ins. Co. v. Benson*, 5 Duer, 168.

Section 2. Exceptions to general rule.

a. When one of several plaintiffs refuses to sue. To the general rule that of the parties to the action, those who are united in interest must be joined, as plaintiffs or defendants, the Code makes several exceptions. It provides that, if the consent of any one who should have been joined as plaintiff, cannot be obtained, he may be made a defendant, the reason therefor being stated in the complaint. Code, § 119. Thus, where an action is brought by a firm against another firm, and one of the members of the plaintiff's firm is also a member of the defendant's firm, on the refusal of the common partner to join with the plaintiffs, he may be made defendant. See *Cole v. Reynolds*, 18 N. Y. (4 Smith) 74. One person cannot be both plaintiff and defendant in the same action. *Methodist Episcopal Church in Pultney v. Stewart*, 27 Barb. 553; *Sherwood v. Barton*, 36 id. 284; 23 How. 533, 544; *Richards v. Richards*, 2 Barn. and Ad. 451. This provision of the Code was framed in accordance with the old chancery practice, and was a substantial reproduction of one of the rules of practice of the supreme court of the United States. *McKenzie v. L'Amoureux*, 11 Barb. 518.

b. When the question litigated is one of common or general interest. A second exception to the rule, that all who are united in interest must be joined as plaintiffs or defendants, was added

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by the legislature to section 119 of the Code, as originally submitted by the commissioners. It provides that when the question litigated is one of a common or general interest to many persons, one or more of them may sue or defend for the benefit of the whole. It is not essential to the right of one to sue for all thus interested, that the parties should be very numerous or that it would be impracticable to bring them all before the court. *McKenzie v. L'Amoureux*, 11 Barb. 518. But it is indispensable that the interest involved is common to all. *Reid v. The Evergreens*, 21 How. 319. To enable a plaintiff to bring a suit in his own right and in behalf of others having a common interest, it is not sufficient to allege that the other parties are so numerous that it would be impracticable to bring them all before the court, but the nature of their common interest must appear to be such as would entitle them, were they all before the court, to maintain the action in their own right or in their own names. *Habicht v. Pemberton*, 4 Sandf. 657. See *Hammond v. Hudson River Iron and Machine Co.*, 20 Barb. 378.

c. *When parties are very numerous.* There are cases in which, in consequence of the great number of parties concerned, it would be impracticable to bring them all before the court, and, in order to prevent a failure of justice, the Code provides that one or more may sue or defend for the benefit of the whole. Code, § 119. This practice was adopted in accordance with the former practice of the court of chancery, and was probably intended to govern such cases only as would have been the subject of a suit in equity, and would have been within the rule as established by that court. *Duffy v. Duncan*, 32 Barb. 587; *Reid v. The Evergreens*, 21 How. 319; *Habicht v. Pemberton*, 4 Sandf. 657. Independently of the Code, the rule of chancery still exists. *Ib.* *Hammond v. Hudson River Iron & Machine Co.*, 20 Barb. 378; *Bouton v. City of Brooklyn*, 15 id. 375. It is said that the provision of the Code applies indiscriminately to all actions, whether they involve questions of common interest or not. *McKnight v. L'Amoureux*, 11 Barb. 518. But it will be found that in all the cases in which equity allowed the court to dispense with the necessity of making the suit absolutely complete, as to parties, there was a right common to all the plaintiffs to be maintained, or an obligation common to all the defendants to be enforced. See *Reid v. Evergreens*, 21 How. 319; *Bouton v. City of Brooklyn*, 15 Barb. 375. Thus, a part of the crew of a privateer may

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bring a suit against the prize agents, in behalf of themselves and others who have signed the articles, for an account and distribution of the prize money; or a few creditors may maintain an action in behalf of themselves, and of all other creditors of a deceased debtor, for an account and application of his assets to the payment of his debts. So, parties to a trust deed for the payment of debts, are allowed to sue on behalf of themselves and the other creditors named. A legatee may also prosecute in the same form for a settlement of the account of the executor and the payment of all the legatees. The parties, also, of a voluntary association, for public or private purposes, may in like manner sue and defend in behalf of themselves and their associates. *Ib.* *Duffy v. Duncan*, 32 Barb. 587; *Hammond v. Hudson River Iron and Machine Co.*, 20 id. 378; *McKnight v. L'Amoureux*, 11 id. 518. So any individual resident of a village, which is not a municipal corporation so as to assert the general right of the public, may bring an action in behalf of himself and of all others similarly interested, to restrain the perversion of land dedicated to public uses, from the legitimate purposes of such dedication. *Cady v. Conger*, 19 N. Y. (5 Smith) 256. But where there are officers authorized to act in behalf of a community, no private person, or number of persons, can assume to be the champions of the public, unless the act complained of involves some peculiar damage to the individual interest or interests of the party or parties plaintiff. *Doolittle v. Supervisors of Broome Co.*, 18 N. Y. (4 Smith) 155; S. C., 16 How. 512; *Roosevelt v. Draper*, 23 N. Y. (9 Smith) 318; *Milhan v. Sharp*, 27 N. Y. (13 Smith) 611; *Ely v. Connolly*, 7 Abb. N. S. 8; *Thurston v. City of Elmira*, 10 Abb. N. S. 119. But although a private individual may not restrain the collection of a tax by injunction, he may, as relator in a writ of mandamus, compel a county treasurer to issue his warrant for the collection of a tax, although the individual has merely an interest common to the whole community. *People ex rel. Stephens v. Halsey*, 37 N. Y. (10 Tiff.) 344; S. C., 4 Trans. App. 261. So a common-law *certiorari* may issue on his relation to review and correct items illegally included in the tax levy of his town. *People ex rel. Haskins v. Supervisors of Westchester*, 8 Abb. N. S. 277; S. C., 57 Barb. 377.

ARTICLE VI.

REMEDY AGAINST ERROR AS TO PROPER PARTIES.

Section 1. Where the action is not brought by the real party in interest. The remedy of a defendant, when sued by a party other than the real party in interest, is by demurrer, if the defect is apparent on the face of the complaint. *Nelson v. Eaton*, 7 Abb. 305; reversing S. C., 15 How. 305; *Palmer v. Smedley*, 6 Abb. 205; S. C. affirmed, 28 Barb. 468; *White v. Brown*, 14 How. 282; *Bank of Havana v. Wickham*, 16 id. 97; S. C., 7 Abb. 134. But, where the defect does not appear upon the face of the complaint, the objection may be taken by answer. *Bank of Havana v. Magee*, 20 N. Y. (6 Smith) 355. But where a plaintiff miscalls himself by a name which represents no person, real or artificial, the remedy of the defendant is neither by answer or demurrer, but by a motion to set aside the service of the summons. Thus, where an individual banker sues in a name importing a corporate character, the defendant, if aggrieved, should move to set aside the first proceeding in the suit. *Ib.*

Section 2. Where there is a non-joinder of plaintiffs. The rule previously stated applies also to cases of non-joinder. Where there is a defect of parties apparent upon the face of the complaint the defendant may demur, and, where such objection exists but does not appear upon the face of the complaint, it may be taken by answer. Where the defect is apparent upon the face of the complaint, and the defendant fails to demur, the objection will be waived. So the defendant will waive his right to object to a defect of parties not apparent upon the face of the complaint, by an omission to raise the objection by answer. *Zabriskie v. Smith*, 13 N. Y. (3 Kern.) 322; Code, §§ 141, 147, 148; *Gassett v. Crocker*, 10 Abb. 133; *Van Deusen v. Young*, 29 Barb. 9.

Section 3. Where there is a misjoinder of plaintiffs. An improper joinder of parties is not a subject of demurrer, as a defect of parties under subdivision 4 of section 144 of the Code. *Allen v. City of Buffalo*, 38 N. Y. (11 Tiff.) 280; *Peabody v. Washington County Mutual Ins. Co.*, 20 Barb. 339; *Richtmyer v. Richtmyer*, 50 id. 55. The defect of parties for which a

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demurrer is allowed under section 144 is for a deficiency and not for an excess of parties. *Ib.* But the defendant is not without a remedy. If there is a misjoinder of parties, or, in other words, if the facts stated in the complaint show no cause of action against the defendants, in favor of one of the plaintiffs, the defendants may demur under the sixth subdivision of section 144, *as to such plaintiff*, upon the ground that the complaint does not state facts sufficient to constitute a cause of action, and, as to such plaintiff, the complaint will be dismissed. If the objection is not raised by demurrer, or does not appear upon the face of the complaint, it may be raised upon the trial, and the complaint will be dismissed as to the plaintiffs, in whose favor no cause of action is shown, and the cause may proceed to judgment as to the rest of the co-plaintiffs as provided in section 274 of the Code. *Palmer v. Davis*, 28 N. Y. (1 Tiff.) 242; *Richtmyer v. Richtmyer*, 50 Barb. 55.

ARTICLE VII.

PARTIES DEFENDANT.

Section 1. Who may be defendants in a suit.

a. Foreign governments and officers. A sovereign State, in its political capacity, cannot be sued in the courts of another State or nation for the purpose of enforcing any remedy against it. But such State may, nevertheless, be made a defendant in an action, for the purpose of giving it an opportunity to appear and thus enable the court to determine more intelligently the rights of co-defendants. The joinder in such cases is but an invitation to appear, and, if disregarded by the State, is a nullity. The appearance of a State, or a judgment entered against it, cannot be enforced in the courts of another State. *Manning v. State of Nicaragua and the Accessory Transit Co.*, 14 How. 517; *Duke of Brunswick v. King of Hanover*, 2 H. L. Cas. 1; *Wadsworth v. Queen of Spain*, *De Haber v. Queen of Portugal*, 17 Q. B. 171.

b. Foreign ambassadors, etc. There are certain persons who would, under ordinary circumstances, be proper parties to an action, but over whom the State courts can exercise no jurisdiction. This class includes all ambassadors and foreign ministers who are recognized as such by the president of the United States,

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as well as their domestics, or domestic servants. It includes also consuls and vice-consuls, secretaries of legation, and attachés. In all suits or proceedings against such persons, the supreme court of the United States has exclusive jurisdiction. Laws of U. S. 1789, ch. 20, §§ 9-13. See *United States v. Ortega*, 4 Wash. C. C. 531; *Ex parte Cabrera*, id. 232; *United States v. Benner*, 1 Baldw. 240; *Davis v. Packard*, 6 Pet. 41; S. C., 10 Wend. 50. To exempt the servant of a public minister from liability to be made a defendant in a State court, it is not necessary that he should reside in the house of his employer, provided he performs the duties of his office there. Nor is it material whether he is a foreigner or a native of this country. *Evans v. Higgs*, 2 Str. 797; S. C., 2 Ld. Raym. 1524; *Lockwood v. Coysgarne*, 3 Burr. 1676. See Arrest and Bail.

Section 2. States. The courts of this State have no jurisdiction over actions in which a State is defendant. The exclusive jurisdiction of such actions is vested in the courts of the United States. *DeLafield v. State of Illinois*, 2 Hill, 159; 26 Wend. 192. See *Teall v. Felton*, 1 N. Y. (1 Comst.) 537, 546; S. C. affirmed, 12 How. (U. S.) 284.

Where a State is the real defendant, an action cannot be maintained by suing the governor of the State, in his official character, where the claim made upon him is founded solely upon his holding that office; and, where no judgment could be had against him personally, the action will be considered as one against the State, as the real party on the record. *Governor of Georgia v. Madrazo*, 1 Pet. 110, 122.

The statute allows an action to be brought against commissioners for loaning certain moneys of the United States; and such action is, in effect, an action against the State. But, before it can be maintained, the State must be properly brought before the court by describing the commissioners as the statute prescribes. *Plumtree v. Dratt*, 41 Barb. 333; Laws 1837, ch. 150, §§ 5, 6, 7, 8.

Section 3. Counties.

a. How counties should be made defendant. The statutes provide that a county may sue or be sued in the manner prescribed by law, and that all proceedings, by or against a county in its corporate capacity, shall be in the name of the board of supervisors of such county. 1 R. S. 364, §§ 1, 3. The suit must be brought against the supervisors of the county as an organized

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body, without naming the individuals comprising such body. Thus an action should be brought against the board of supervisors of (Livingston) county, rather than against A., B. and C., supervisors of (Livingston) county. *Hill v. Board of Supervisors of Livingston Co.*, 12 N. Y. (2 Kern.) 52; *Magee v. Cutler*, 43 Barb. 239, 261; *Wild v. Board of Supervisors of Columbia Co.*, 9 How. 315.

Section 4. Towns.

a. How towns should be made defendant. Towns must be sued in their corporate name. 2 R. S. 473, § 95; *Hill v. Board of Supervisors of Livingston Co.*, 12 N. Y. (2 Kern.) 52 (63). The summons must be served on the supervisor of the town, and it is his duty to attend to the defense. See 1 R. S. 357, §§ 2, 3; *Cornell v. Town of Guilford*, 1 Denio, 510; *Town of Duanesburgh v. Jenkins*, 46 Barb. 295.

Section 5. Corporations.

a. Municipal corporations. Corporations aggregate must be sued by their corporate names. This rule applies to all corporations indiscriminately. 1 R. S. 599, § 1.

b. Foreign corporations. The statutes provide that suits may be brought in the supreme court, in the superior court of the city of New York, and in the court of common pleas in and for the city and county of New York, against any corporation created by or under the laws of any other State, government or country, for the recovery of any debt or damages, whether liquidated or not, arising upon contract made, executed or delivered within this State, or upon any cause of action arising therein. 2 R. S. 459, § 15. The action may be maintained by a resident of this State for any cause of action, and by a non-resident, when the cause of action or the subject of the action shall be situated within the State. Code, § 427; *President, etc., of Bank of Commerce v. Rutland & Washington R. R. Co.*, 10 How. 1, 10 n.; *Cumberland Coal and Iron Co. v. Hoffman Steam Coal Co.*, 20 id. 62; S. C., 30 Barb. 159; 8 Abb. 243; *Spencer v. Rogers' Locomotive and Machine Works*, 8 Bosw. 612; 17 Abb. 110.

Where the object of the action is to annul a conveyance of land situated in another State, on the ground of fraud in the conveyance, and the plaintiff and defendant are both foreign corporations, the courts of this State will not entertain jurisdiction. *Cumberland Coal and Iron Co. v. Hoffman Steam Coal Co.*, 30 Barb. 159; 20 How. 62; 8 Abb. 243. The directors of a foreign

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corporation will not be enjoined by the courts of this State from paying a dividend where there is no debt due to the plaintiff, and where he has no claim for the redress of any wrong, and his only claim is, that there was an error in making the dividend. *Howell v. Chicago & Northwestern Railway Co.*, 51 Barb. 378. A foreign corporation may appear by attorney, and, in that manner, confer jurisdiction. *De Bemer v. Drew*, 57 Barb. 438; 39 How. 466.

c. Domestic corporations. It is not only true that corporations are liable to be sued in their corporate names, and in the same cases as natural persons, but there are collective bodies of men who are invested with corporate attributes, and are considered as *quasi* corporations, and in that capacity are vested with the powers and liabilities of corporations, so far as the right to bring or defend an action is concerned. Thus, the Metropolitan Fire Department of the city of New York, although it is not in terms declared to be a body politic or corporate; and although it has express power to sue, has no express capacity to be sued; yet it is so far a corporation as to be capable of being sued for injuries occasioned by the negligence of its agents or servants. *Clarissey v. Metropolitan Fire Department*, 1 Sweeny, 224; S. C., 7 Abb. N. S. 352.

Section 6. Associations.

a. Suits against joint-stock companies and associations. Any joint-stock company or association, consisting of seven or more shareholders or associates, may sue and be sued in the name of the president or treasurer for the time being. Laws of 1849, ch. 258. In the same manner, any company or association composed of not less than seven members, who are owners of or have an interest in any property, right of action or demand, jointly or in common, or who may be liable to any action on account of such ownership or interest, may sue or be sued in the name of the president or treasurer for the time being. Laws of 1851, ch. 455; *Kingsland v. Braisted*, 2 Lans. 17.

b. Banking associations. So, banking associations, formed under the "Act to authorize the business of banking," passed April 18, 1838, may be sued in the name of their president. 4 R. S. 132, § 22, Edm. ed.; Laws of 1838, ch. 260, § 22; *DeLafield v. Kinney*, 24 Wend. 345.

Section 7. Individuals generally.

a. In general. In the preceding sections, the liabilities of artificial persons, or corporations to be made defendants in their

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collective or corporate capacity, have been briefly discussed. The liability of persons in their individual or representative character, to be made defendants, in actions on demands against them, or those whom they represent, still remains to be considered. The Code gives the general rule, that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein. Code, § 118. The rule of the Code was borrowed from the chancery practice, and was intended to preserve the right, and also to make it the duty, of the plaintiff to make all persons directly interested in the question or controversy, as stated in the complaint, parties to the action, in order that the decree of the court may be final. *Voorhies v. Baxter*, 1 Abb. 43; S. C., 18 Barb. 592; affirmed, 17 N. Y. (3 Smith) 354. See *Christie v. Herrick*, 1 Barb. Ch. 254. The illustration of this general rule will be found in following pages relating to the joinder of defendants.

b. Married women. In respect to married women, as defendants, the Code has made but one important change from the former practice in chancery. In chancery, the wife was required in all cases to appear and defend by next friend. This was for some time held to be the rule under the Code, except in the single case of an action for an absolute divorce. *Coit v. Coit*, 6 How. 53; *Cook v. Rawdon*, id. 233; S. C., 1 Code R. N. S. 382; *Howland v. Fort Edward Paper Mill Co.*, 8 How. 505. To avoid this construction of the Code, the legislature provided by express enactment, that in no case need a married woman prosecute or defend by a guardian or next friend. Code, § 114. The Code does not, however, give a complete rule of practice in relation to the joinder of the husband in actions against the wife. Under the Code, when a married woman is a party, her husband must be joined with her, except that: 1. When the action concerns her separate property she may sue alone. 2. When the action is between herself and her husband she may sue or be sued alone. Code, § 114. Under this section of the Code, a wife cannot be sued alone except by her husband. The husband must be joined, except where she sues in respect of her separate property, or where the action is between husband and wife. But by the act of 1860, as amended by the act of 1862, any married woman may sue or *be sued*, in all matters *having*

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*relation to her sole and separate property, in the same manner as if she were sole. In such actions, the husband is exonerated from all costs and damages recovered, and the judgment is made a charge upon the separate property of the wife, which may be enforced by execution against it, in the same manner as if she were sole. Laws of 1862, ch. 172; Klen v. Gibney, 24 How. 31; Morrell v. Cawley, 17 Abb. 76. This act certainly modifies the Code, and, in its letter authorizes the making of a married woman sole defendant, in all matters touching her separate estate or arising therefrom. This rule applies to actions *ex delicto*, as well as to actions *ex contractu*. Rowe v. Smith, 55 Barb. 417; S. C., 38 How. 37. The disabilities of coverture, as such disabilities existed at common law, are removed. The old common law is an utter stranger to the modern wife, and furnishes no decisions, grounded upon that ancient relation of *baron and feme*, which can apply as precedents to the new creature of the statutes. But, the principles of the common law, regulating the conduct of other members of society, who act on their individual responsibility, as persons, *sui juris*, are applicable to a married woman, under the recent statutes.*

The wife becomes, in law, in respect to her new situation, a *feme sole*, invested with the same rights, and amenable to the same duties, as other persons who are not under the guardianship or dominion of others. *Peak v. Lemon*, 1 Lans. 295. But these rights and duties are such only as relate to or arise out of her separate property; and when it is said that the husband is not a necessary defendant, in an action founded on the tort of the wife, this qualification should always be in mind. Thus, torts of a personal character, such as assault and battery, libel, slander, and for penalties in no way affecting or arising from the separate estate of a married woman, should be carefully distinguished from the class of torts frequently arising out of the conduct of business, such as negligence, trespass on land, trover, replevin, fraud, etc. The former are the personal acts of the wife, for which the husband is held responsible upon the theory that he has the power to control the conduct of his wife; while for the latter, the husband is not held responsible, in consequence of the manifest injustice of holding him liable for all the wife's errors of omission or commission in the conduct of her independent business. *Rowe v. Smith*, 55 Barb. 417; S. C., 38 How. 37; *Peak v. Lemon*, 1 Lans. 295; *Horton v. Payne*, 27 How. 374; *Porter v.*

Married women — Idiots, lunatics, drunkards.

Mount, 45 Barb. 422; *Tait v. Culbertson*, 57 id. 9; *Klen v. Gibney*, 24 How. 31; *Morrell v. Cawley*, 17 Abb. 76. Thus, the husband should not be made a defendant in an action to recover back excessive interest, paid upon a loan made by the wife, out of her separate estate, through the husband as agent. *Porter v. Mount*, 45 Barb. 422; S. C., 41 id. 561. Neither should the husband be made a party defendant, in an action for damage done, by the cattle of a married woman, to the plaintiff's land. *Rowe v. Smith*, 55 Barb. 417; S. C., 38 How. 37. Nor can the husband properly be made a defendant in an action for the conversion of personal property, based on the refusal of the wife to deliver such property to the owner, on the ground that she has a lien thereon, although the husband was present at the time of the refusal. It is the nature and not the validity of the wife's claim, respecting her separate property, which determines her liability and her husband's exemption. *Peak v. Lemon*, 1 Lans. 295.

But an action will lie against the husband and wife jointly, for a libel written and published by the wife alone. *Tait v. Culbertson*, 57 Barb. 9; *Horton v. Payne*, 27 How. 374. So, for an assault and battery committed by the wife alone, both husband and wife are liable, and should be joined as defendants. *Flanagan v. Tinen*, 53 Barb. 587; S. C., 37 How. 130. In case of a recovery, the execution, in all such cases, is directed against the property of both. *Ib.* *Tait v. Culbertson*, 57 Barb. 9.

c. Idiots, lunatics and habitual drunkards. A lunatic may be made defendant in an action in the same manner as a sane person, but the court imposes certain conditions as to the commencement of an action against him. Before the commencement of any action against any person judicially declared to be of unsound mind, the plaintiff should petition the court for the payment of his debt; and, on such application, the court will order the committee to pay the debt out of the lunatic's estate, or order a reference to inquire into the justice of the claim, or grant leave to sue. It is a contempt of court, to bring an action against a lunatic as a defendant, without first obtaining leave of court.

Williams v. Estate of Cameron, 26 Barb. 172; *Matter of Hopver*, 5 Paige, 489. But until office found, lunatics may be sued in the same manner as a sane person. *Heller v. Heller*, 6 How. 194. The same rules apply to idiots and habitual drunkards as defendants. The service of process in such actions is regulated by section 134 of the Code. For forms, see Leave to Sue, etc.

Infants—Convicts.

d. Infants. Where an infant is a party to an action, he must appear by a guardian specially appointed for the action. This guardian, usually called a guardian *ad litem*, must be appointed by the court in which the action is prosecuted, or by a judge of the court, or a county judge. Code, § 115. The manner of procuring the appointment of a guardian for an infant defendant, and the manner of procuring the service of the summons in such cases, is specifically described in the Code, and may be found in a preceding chapter of this work, See Code, §§ 116, 134. See, also, *ante*, 109.

The requirement of the Code is imperative, and an infant defendant, for whom no guardian *ad litem* has been appointed, cannot waive the objection to the regularity of the proceedings. *Fairweather v. Satterly*, 7 Rob. 546. The entry of judgment in such a case is not a mere irregularity, but an error in fact, and such judgment may be set aside on motion. *McMurray v. McMurray*, 9 Abb. N. S. 315. For forms, see Leave to Sue, Appearance, etc.

e. Convicts. The statute provides, that a person sentenced to imprisonment in a State prison for life, shall thereafter be deemed civilly dead. Also, that a sentence of imprisonment in a State prison, for any term less than life, suspends all the civil rights of the person so sentenced, and forfeits all public offices, and all private trusts, authority or power, during the term of such imprisonment. 2 R. S. 701, §§ 19, 20. While these provisions of the statute deprive a person sentenced to a State prison, either for life or for a term of years, of all rights as a plaintiff in an action, it does not, on the other hand, free him from all liability as a defendant therein. The situation of *civiliter mortuus* does not protect him from the claims of private individuals, or the necessities of public justice. The statute suspends his rights alone, and not the rights of others against him. Though he may not sue, he may be sued, and execution issued against him. *Davis v. Duffie*, 4 Abb. N. S. 478; S. C., 3 Trans. App. 54; 3 Keyes, 606; affirming S. C., 8 Bosw. 617. So any person imprisoned by virtue of any proceedings in a civil suit may be sued and prosecuted to judgment, and may be proceeded against in all the modes prescribed by law, to enforce civil remedies, as if he were at large. *Morris v. Walsh*, 14 Abb. 387; S. C., 9 Bosw. 636.

Who may be joined as defendants.

f. Unknown defendants. It often occurs that it is necessary to make a party defendant whose name is unknown to the plaintiff. For such cases, the Code provides that the defendant may be prosecuted under any name, and when the true name is discovered, the pleadings or proceedings may be amended accordingly. Code, § 175.

g. Non-resident defendants. The right to make a foreign corporation a party defendant in an action has been briefly discussed in a preceding article. See § 5, *b*, *ante*, 122. The Code also makes numerous provisions for the commencement and maintenance of actions against individual non-residents, and prescribes how jurisdiction may be acquired over their persons and property. The service of process on non-residents, the provisional remedies allowable against them, and the general practice in actions against such defendants, will be found discussed at length under appropriate heads. See Code, §§ 135, 179, 227, 415.

ARTICLE VIII.

WHO MAY BE JOINED AS DEFENDANTS.

Section 1. In general. Any person may be made a defendant, who has or claims an interest adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein. Code, § 118. This was always a general rule of chancery. See *Christie v. Herrick*, 1 Barb. Ch. 254, 260. The interest referred to is an interest involved in the issue, and necessarily to be affected by the decree. *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344, 350. As the court will not permit several plaintiffs to demand by one complaint several matters, perfectly distinct and unconnected, against one defendant, so it will not permit one plaintiff to demand several matters of different natures against several defendants. But where several persons, although unconnected with each other, are made defendants, a demurrer will not lie if they have a common interest centering in the point in issue in the cause. The presence of this interest is a test of the proper joinder of defendants. *Fellows v. Fellows*, 4 Cow. 682. Chancellor KENT, after a careful review of the English authorities, deduced from the cases examined, the general rule, that a bill against several persons must relate to matters of the same nature and having a connection

with each other, and in which all the defendants are more or less concerned, though their rights in respect to the general subject of the case may be distinct. *Brinkerhoff v. Brown*, 6 Johns. Ch. 139. The rule is clear, and the only difficulty lies in its application.

Section 2. In real actions.

a. In actions to foreclose a mortgage. In actions for the foreclosure of a mortgage, every person interested in, or having any title to, or lien upon, an estate, if acquired subsequent to the mortgage, must be made a party, or the suit will result in but a partial determination of the rights involved, and the title obtained under the decree will be defective. *Brainard v. Cooper*, 10 N. Y. (6 Seld.) 356; *Gage v. Brewster*, 31 N. Y. (4 Tiff.) 218; *Peabody v. Roberts*, 47 Barb. 91. But this rule applies only to junior incumbrances. Strictly speaking, the only proper parties to an action of foreclosure are the mortgagor and the mortgagee, and those who have acquired rights or interests under them subsequent to the mortgage. The mortgagee has no right to make one who claims adversely to the title of the mortgagor, and prior to the mortgagee, a party defendant for the purpose of trying the validity of his adverse claim of title. *Corning v. Smith*, 6 N. Y. (2 Seld.) 82; *Lewis v. Smith*, 9 N. Y. (5 Seld.) 502; *McReynolds v. Munns*, 2 Keyes, 214. But the plaintiff may also make a prior incumbrancer a party to the action, for the purpose of having the amount of such incumbrances liquidated and paid out of the proceeds of the sale, or he may, at his option, have the premises sold subject to such prior incumbrance. *Holcomb v. Holcomb*, 2 Barb. 20. The court, in such cases, allows the prior incumbrancer to be made a party, not for the purpose of litigating titles, but for the purpose of disposing of the entire estate by one decree, thus preventing a multiplicity of suits. *Chamberlain v. Lyell*, 3 Mich. 448. So the person to whom a mortgagor has contracted to convey the mortgaged premises is a proper, although not a necessary, party to an action for the foreclosure. *Crooke v. O'Higgins*, 14 How. 154. So an assignee or purchaser, *pendente lite*, is not a necessary party, but may be brought in at his own request. *Cleveland v. Boerum*, 3 Abb. 294; S. C., 27 Barb. 252; 23 id. 201; affirmed, 24 N. Y. (10 Smith) 613.

b. In actions of ejectment. The proper parties defendant in an action of ejectment, under the provisions of the Revised

In actions for torts — Ejectment — Negligence.

Statutes, were: 1st. The occupant, when the premises are actually occupied; 2d. When the premises are not actually occupied, then the person exercising acts of ownership; or, 3d. Any person claiming title thereto or some interest therein at the commencement of the suit. *Taylor v. Crane*, 15 How. 358; *People v. Ambrecht*, 11 Abb. 97; S. C. affirmed, 24 How. 610. Previous to the amendment of the Code in 1867 it was held that the character and form of the action of ejectment had not been essentially changed by the Code, and that it was still a possessory action to be brought against the actual occupant, with liberty to any party claiming an interest to be made a party on application. And it was a comparatively well-settled rule that, in actions against a tenant to recover land held by him, the landlord, or any person having any privity of estate or interest with the landlord or tenant, could not be made a party except at his election and on his own application. *Pulen v. Reynolds*, 22 How. 353; *Van Buren v. Cockburn*, 14 Barb. 118; *Godfrey v. Townsend*, 8 How. 398. See *Tompkins v. White*, id. 522; *Ames v. Harper*, 48 Barb. 56; *Abeel v. Van Gelder*, 36 N. Y. (9 Tiff.) 513; S. C., 2 Trans. App. 99. But by the amendment of the Code in 1867, an additional clause was added to section 118, providing that, in an action to recover the possession of real estate, the landlord and tenant thereof may be joined as defendants; and any person claiming title or a right of possession of real estate may be made parties plaintiff or defendant as the case may require. This undeniably changes the former rule. All tenants occupying land may be joined as defendants in an action to recover possession thereof. Thus, in an action of ejectment for a lot alone, upon which a building has been wrongfully continued after the expiration of the lease, all parties occupying separately the different stories of the building may be made defendants as joint trespassers on the land in using it to uphold the building. *Pearce v. Ferris*, 10 N. Y. (6 Seld.) 280. So under the Code as amended, the landlord or any person claiming title or right of possession may be joined with such tenants as co-defendants. Code, § 118.

Section 3. In actions for torts.

a. Negligence. The liability of parties for a joint tort is either joint or several, and an action may be brought against such parties, jointly or separately, at the option of the party aggrieved. *Waterbury v. Westervelt*, 9 N. Y. (5 Seld.) 598; *King v. Orser*,

4 Duer, 431; *Nichols v. Michael*, 23 N. Y. (9 Smith) 264. Thus both principal and agent may be made defendants in an action for damages for a personal injury caused by the negligence of the agent in the course of his employment, although the act was done in the absence of the principal (*Phelps v. Wait*, 30 N. Y. [3 Tiff.] 78; *Creed v. Hartmann*, 29 N. Y. [2 Tiff.] 591; affirming S. C., 8 Bosw. 123); so a joint action may be maintained against both landlord and tenant for joint negligence in the use of the premises leased. *Irvin v. Fowler*, 5 Rob. 482; S. C., 4 id. 138. Master and servant may also be joined in an action to recover damages for the negligence of the servant (*Montfort v. Hughes*, 3 E. D. Smith, 591; *Suydam v. Moore*, 8 Barb. 358); but a distinction must be made between negligence and a willful injury on the part of the servant. *Wright v. Wilcox*, 19 Wend. 345. So a passenger may bring a joint action against two railroad corporations to recover damages for injuries received by a collision resulting from the concurrent negligence of both companies. *Colegrove v. New York & New Haven and New York & Harlem Railroad Companies*, 20 N. Y. (6 Smith) 492; affirming 6 Duer, 382.

b. Joint trespass. Where two or more persons are liable for one and the same trespass, the party aggrieved has his election to prosecute both in one action, or to sue them separately. *Kasson v. People ex rel. Pease*, 44 Barb. 347. Thus, a sheriff being liable for the misfeasance of his deputy, both may be joined in an action for a trespass committed by the latter. *Waterbury v. Westervelt*, 9 N. Y. (5 Seld.) 598; *King v. Orser*, 4 Duer, 431.

c. Conversion. Where a party has obtained possession of goods by fraud and transferred them by assignment to another, both assignor and assignee may be joined in an action for the wrong. See *Nichols v. Michael*, 23 N. Y. (9 Smith) 264.

d. Slander and libel. As a general rule, an action for slander will not lie against two, though an action for composing and publishing a libel may. *Forsyth v. Edmiston*, 2 Abb. 430; S. C., 5 Duer, 653; *Thomas v. Rumsey*, 6 Johns. 26.

e. Husband and wife. As to the joinder of husband and wife in actions for the tort of the wife, see Married women, *ante*, 124, 126.

Section 4. Persons liable on the same instrument.

a. In general. At common law, a joint action could not be maintained against parties upon covenants entered into by them

 Persons liable on the same instrument.

severally; and when the covenant was joint and several, it was necessary to treat the action as joint as to all, or several as to all, or, in other words, to join all the parties to the covenant as defendants in one action, or to bring as many actions upon the covenant as there were parties thereto. It was not allowable to sue a part jointly, and others severally. *De Ridder v. Schermerhorn*, 10 Barb. 638. But, under the Code, persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all, or any of them, be included in the same action at the option of the plaintiff. Code, § 120. This provision of the Code does not in any way affect or change the liabilities of the several parties to the instrument. It does not change a several liability into a joint liability, but, for the convenience of the plaintiff, permits him to sue all parties to the note in a single action. *Alfred v. Watkins*, 1 Code R. N. S. 343. Thus the contract of the indorser of a note is independent and distinct from that of the maker, and, although the statute gives the right to join them in a single suit, it preserves the relations of the parties and does not make them joint debtors. See *Farmers' Bank of Amsterdam v. Blair*, 44 Barb. 641; *Kelsey v. Bradbury*, 21 id. 531; affirming S. C., 12 N. Y. Leg. Obs. 222. This provision of the Code is not confined to the original parties to the same instrument, but extends to their personal representatives. Thus the executor of an indorser, and the maker of a note may be joined as defendants in an action on the note, although they are charged in different capacities, since they are liable on the same instrument. *Churchill v. Trapp*, 3 Abb. 306. The case would be different, however, were the original liability joint instead of several, and the maker solvent. *Morehouse v. Ballou*, 16 Barb. 289; *Voorhis v. Baxter*, 18 id. 592; S. C., 1 Abb. 43; *Yorks v. Peck*, 14 Barb. 644; *Hulbert v. Ferguson*, 40 How. 474.

This section of the Code applies to bonds as well as notes. All or any of the parties severally liable on a bond may be joined in the same action. *Brainard v. Jones*, 11 How. 569; *Quigley v. Walter*, 2 Sweeny, 175. So a joint action will lie under this section against a lessor and one who is a party to the lease, and therein guarantees the performance of the lessor's covenants. *Carman v. Plass*, 23 N. Y. (9 Smith) 286.

But it must be borne in mind that, prior to the Code, persons who were only severally liable could not be joined in the same

Persons liable on the same instrument — United in interest.

action as parties defendant, and that the only exception to the old rule is contained in section 120 of the Code. This section only authorizes the joinder of parties severally liable upon the *same* obligation or instrument. Its application must not be extended beyond its legal intent. *Le Roy v. Shaw*, 2 Duer, 626; *Strong v. Wheaton*, 38 Barb. 616.

Thus, the guarantor and the maker of a promissory note must not be joined in the same action as defendants, as a promissory note and a guaranty of payment written upon it are different instruments, and impose distinct and different obligations. *Brewster v. Silence*, 8 N. Y. (4 Seld.) 207; *Allen v. Fosgate*, 11 How. 218; *Le Roy v. Shaw*, 2 Duer, 626; *De Ridder v. Schermerhorn*, 10 Barb. 638. The fact that the note and the contract of guaranty are upon the same paper does not bring the case within the provisions of the section. *Phalen v. Dingee*, 4 E. D. Smith, 379; *Gould v. Moring*, 28 Barb. 444. See *Church v. Brown*, 21 N. Y. (7 Smith) 315. The same principle would also prevent the joining of the indorser and maker of a note, or the drawer and acceptor of a bill of exchange, were it not that special provision is made for such cases in section 120. *Carman v. Plass*, 23 N. Y. (9 Smith) 286. But the section does not authorize the joinder of the parties to a note in an action arising out of but not directly upon the note. Thus, an indorser who has been defeated in a suit upon a note cannot join prior indorsers, in an action to recover the amount he has been compelled to pay. *Barker v. Cassidy*, 16 Barb. 177. So, although the section applies to *obligations* as well as instruments on which the parties are severally liable, the word "obligation" must be confined to its legal meaning, and construed to embrace those securities only which are known in the law as bonds. Its meaning cannot be extended to embrace a cause of action not evidenced by a writing. *Strong v. Wheaton*, 38 Barb. 616. It, however, includes obligations in the nature of a bond, as undertakings, etc. *Ib.*

ARTICLE IX.

WHO MUST BE JOINED AS DEFENDANTS.

Section 1. All persons united in interest.

a. In general The Code gives the general rule that, of the parties to the action, those who are united in interest must be

United in interest — Exceptions to rule — In foreclosure.

joined as plaintiffs or defendants. Code, § 119. It is probable that this union of interest refers to such cases as those of joint-tenants, co-trustee, partners, joint-owners or joint-contractors, simply, where a separate judgment in favor of one would not be proper in the case as stated in the complaint. The Code has not fixed any standard, for that union of interest among parties defendant, which renders their joinder in an action compulsory. Probably the common-law rule is the best test of proper joinder in such cases, and if, according to the established practice of the common-law courts, an action could have been maintained against the defendants severally, their joinder in one action under the Code is not compulsory. See *Jones v. Felch*, 3 Bosw. 63. As to the nature of that interest, see Articles 4 and 9 of this chapter.

Section 2. Exceptions to the general rule.

a. Where parties are numerous, etc. Where the question in litigation is one of common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them before the court, one or more may sue or defend for the benefit of the whole. Code, § 119. See *ante*, 117.

b. Residents and non-residents. Where an action is brought upon a joint indebtedness, and the obligation of each joint debtor extends to the whole demand, the plaintiff is not compelled to join, as defendants, any of such debtors as may reside out of the State. Thus, where a copartnership is composed of resident and non-resident partners, it is unnecessary to join in an action against the partnership the partners who are non-residents. *Brown v. Birdsall*, 29 Barb. 549; *Darwent v. Walton*, 2 Atk. 510. But where non-residents have rights wholly distinct from those of the resident parties, they must be joined as defendants. Thus, where a judgment creditor attempts to reach moneys due upon a mortgage which he alleges has been fraudulently assigned by the debtor, the assignee of the mortgage must be made a party, although he resides out of the State. *Gray v. Schenck*, 4 N. Y. (4 Comst.) 460.

Section 3. In real actions.

a. Actions of foreclosure. It may be laid down as a general rule that there can be no foreclosure nor redemption unless all the parties entitled to the mortgage money are before the court. The court acts upon the principle that the rights of no man shall be finally decided in a court of justice unless he himself be present, or at least until he has had a full opportunity to appear

In real actions — Action for foreclosure — For partition.

and vindicate his rights. A decree in a foreclosure suit is binding only upon such parties. *Denton v. Nanny*, 8 Barb. 618, 624.

The owner of the equity of redemption is of course a necessary party; and this is true even though he owns the right by virtue of a deed unrecorded at the time of the commencement of the suit and of the filing of the notice of *lis pendens* (*Hall v. Nelson*, 14 How. 32; S. C., 23 Barb. 88; *Griswold v. Fowler*, 6 Abb. 113); so the wife of the mortgagor is a necessary party in order to bar her right of dower, even when the mortgage is given to secure the payment of the purchase-money. *Mills v. Van Voorhies*, 20 N. Y. (6 Smith) 412; S. C., 10 Abb. 152; *Denton v. Nanny*, 8 Barb. 618; *Vartie v. Underwood*, 18 id. 561. The same rule applies to the wife of the grantee of the mortgagor (*Mills v. Van Voorhies*, 10 Abb. 152; S. C., 20 N. Y. (6 Smith) 412; 23 Barb. 125); so a purchaser at a sheriff's sale must be made a party to a foreclosure suit, although he does not get his deed until after the commencement of the action. *N. Y. Life Ins. & Trust Co. v. Bailey*, 3 Edw. Ch. 416. Where the equity of redemption has been conveyed to the trustees of a corporation, in trust or for the use of the corporation, such trustees are not necessary parties. But had no use or trust been declared in the deed, and an absolute and unrestricted conveyance made to the trustees as mere *descriptio personarum*, the trustees would then be necessary parties, as the title would be vested in them. *Case v. Price*, 9 Abb. 111; S. C., 17 How. 348. All incumbrancers existing at the commencement of the suit must be made parties, or their rights will not be affected by the decree and sale thereon. *Ensworth v. Lambert*, 4 Johns. Ch. 605. And, in general, the proper parties to an action of foreclosure are the mortgagor and mortgagee, and those who have acquired rights or interests under them subsequent to the mortgage. *Eagle Fire Co. v. Lent*, 6 Paige, 635; S. C., 1 Edw. Ch. 301.

b. Action for partition. A decree for a partition cannot be made unless all the persons interested in the premises are made parties to the suit. All tenants in common are indispensable parties, and by the strict rules of law all persons must be made parties, who have by any means or contingency an interest in the premises. *Burhans v. Burhans*, 2 Barb. Ch. 398; *Ripple v. Gilborn*, 8 How. 456. Thus, a widow entitled to dower in an undivided share of premises, held in common, is a necessary party in an action for partition. But judgment creditors and

Actions against partnerships.

other incumbrancers are not proper parties, even where a sale of the premises is decreed, as the purchaser at such sale takes the premises subject to the incumbrances. *Sebring v. Mersereau*, 9 Cow. 344. See *Sears v. Hyer*, 1 Paige, 483; *Wotten v. Copeland*, 7 Johns. Ch. 140. See *Whitton v. Whitton*, 38 N. H. (1 Chand.) 134. The true rule is that no persons are to be made parties except those who have a present interest in the premises. *Sebring v. Mersereau*, 9 Cow. 344.

Section 4. Actions against partnerships.

a. General partnerships. In actions against partnerships all known partners must be joined as defendants. *Wooster v. Chamberlin*, 28 Barb. 602. But where credit is given to a firm supposed to consist of a certain number of persons, the persons extending such credit may sue the known partners without joining others unknown at the time of the transaction on which the suit is founded, and whose connection with the firm was in no way notorious or disclosed. *Brown v. Birdsall*, 29 Barb. 549; *Hurlbut v. Post*, 1 Bosw. 28; *North v. Bloss*, 30 N. Y. (3 Tiff.) 374. So the executor of a deceased partner cannot be joined as a party defendant with the surviving partner in an action for a partnership debt, unless it is shown that the surviving partner is insolvent. *Voorhis v. Child's Executor*, 17 N. Y. (3 Smith) 354; *Richter v. Poppenhausen*, 42 N. Y. (3 Hand) 373; S. C., 9 Abb. N. S. 263.

b. Limited partnerships. In actions against limited partnerships the general partners only are necessary defendants, and an action may be maintained against them in the same manner as if there were no special partners. But where the name of any special partner is used in the firm with his privity he must be deemed a general partner. 1 R. S. 766, §§ 13, 14. See *Ward v. Newell*, 42 Barb. 482; S. C., 28 How. 102; *Madison Co. Bank v. Gould*, 5 Hill, 309; *Schulten v. Lord*, 4 E. D. Smith, 206.

c. Actions between firms having a common partner. An action at common law could not be maintained by one firm against another firm having a partner common to both, on the principle that no person can be allowed to sue himself, or that the same person could not be both plaintiff and defendant in the same action. *Englis v. Furniss*, 4 E. D. Smith, 587; S. C., 2 Abb. 333. Such an action could, however, be maintained in equity. But, under the present practice, all distinctions between law and equity being abolished, such an action may be main-

Persons in an individual and in a representative character.

tained, whether the cause of action or defense is of a legal or an equitable nature. *Cole v. Reynolds*, 18 N. Y. (4 Smith) 74; *Kingsland v. Braisted*, 2 Lans. 17.

Section 5. Persons in an individual and persons in a representative character.

a. In general. It may be laid down as a general rule, that in actions merely personal, for the recovery of money only, defendants primarily and personally liable cannot be joined with others liable only in a representative capacity. *Union Bank v. Mott*, 27 N. Y. (13 Smith) 633; *Gardner v. Walker*, 22 How. 405; *Voorhis v. Child's Executor*, 17 N. Y. (3 Smith) 355. When parties are *jointly and severally* liable, either for torts or upon contracts, the personal representatives of the deceased parties may be proceeded against by action at the same time with actions against the surviving parties, but it must be by separate actions and not by joining both classes of defendants in one action. *lb.* Neither can the executor of a deceased *joint* debtor be joined as a defendant with the survivor in an action at law on the joint obligation. *Voorhis v. Child's Executor*, 17 N. Y. (3 Smith) 354; *Richter v. Poppenhausen*, 9 Abb. N. S. 263; S. C., 42 N. Y. (3 Hand) 373; *Fine v. Richter*, 3 Abb. N. S. 385. It is not certain that such joinder would be allowable in equity. Thus the executor of a deceased partner becomes liable for a partnership debt, only on proof that the survivor is insolvent, and that the creditor has exhausted his remedy at law against him (*Bank of Cooperstown v. Corlies*, 1 Abb. N. S. 412); but whether, in an action for a partnership debt, and on a complaint setting forth the inability of the plaintiff to obtain satisfaction from the survivor, the executor of a deceased partner may be joined with the survivor because of his interest in contesting the allegation of insolvency, and for the purpose of adjusting the equities between the partnership estate and that of its members in one action and judgment, is unsettled by the cases. See *Voorhis v. Child's Executor*, 17 N. Y. (3 Smith) 354; *Riper v. Poppenhausen*, 43 N. Y. (4 Hand) 68. But executors and parties in an individual capacity may undoubtedly be joined in real actions. Thus, in an action brought against executors to recover a legacy claimed under the will and charged upon the real estate, all persons interested in the residue, as the widow and heirs at law, should be made defendants. *Tonnelle v. Hall*, 3 Abb. 205. See *Trustees of the Theological Seminary of*

Parties to fraudulent conveyances.

Auburn v. Kellogg, 16 N. Y. (2 Smith) 83; reversing S. C., 20 Barb. 323; *Richtmyer v. Richtmyer*, 50 id. 55, 60.

b. Cestui que trust and trustee. Trustees of an express trust may defend without joining the *cestui que trust*. *Mead v. Mitchell*, 5 Abb. 92, 106; S. C. affirmed, 17 N. Y. (3 Smith) 210.

c. Receiver and owner of trust fund. A receiver must not be joined as a party defendant in an action against the original owners of the trust fund, unless some relief is prayed or some cause of action is shown against the receiver. *Arnold v. Suffolk Bank*, 27 Barb. 424. But in a creditor's suit, maintained by judgment creditors on their own account, to set aside, as fraudulent, and to declare void a mortgage, a receiver previously appointed may be made defendant on the ground that he will not act, or that he neglects to act, in the premises. *Gere v. Dibble*, 17 How. 31. See *Bennett v. McGuire*, 58 Barb. 625.

d. Assignor and assignee. The assignor and assignee must be joined as defendants in a creditor's suit instituted to set aside, as fraudulent, a prior assignment made for the benefit of creditors. *Lawrence v. Bank of the Republic*, 35 N. Y. (8 Tiff.) 320; S. C., 31 How. 502; 4 Abb. N. S. 134; *Beardsley Scythe Co. v. Foster*, 36 N. Y. (9 Tiff.) 561; S. C., 3 Trans. App. 215; 34 How. 97; *Wallace v. Eaton*, 5 id. 99; S. C., 3 Code R. 161; *Reed v. Stryker*, 12 Abb. 47.

Section 6. Parties to fraudulent conveyances. Where a debtor, with intent to defraud his creditors, has conveyed his estate, in separate parcels, to different individuals, all such grantees should be made defendants in an action to set aside such conveyances, although there is no privity between them. It is sufficient to authorize such joinder that there is a privity between each of them and the debtor, and that they have each an interest in the controversy. *Reed v. Stryker*, 12 Abb. 47; *Newbould v. Warrin*, 14 id. 80; *Durand v. Hankerson*, 39 N. Y. (12 Tiff.) 287; *Morton v. Weil*, 33 Barb. 30; S. C., 11 Abb. 421; *Sage v. Mosher*, 28 Barb. 287. This rule applies although a part of such grantees are non-residents. *Gray v. Schenck*, 4 N. Y. (4 Comst.) 460. The judgment debtor is also a necessary party. *Lawrence v. Bank of the Republic*, 35 N. Y. (8 Tiff.) 320; S. C., 31 How. 502; *Beardsley Scythe Co. v. Foster*, 36 N. Y. (9 Tiff.) 561; S. C., 3 Trans. App. 215; 34 How. 97; *Wallace v. Eaton*, 5 id. 99; S. C., 3 Code R. 161. But a party who has innocently accepted a deed of the property for the benefit of the

Non-joinder and misjoinder of parties defendant.

alleged fraudulent grantee, and who has conveyed in accordance with the trust, is not a necessary party. *Spicer v. Hunter*, 14 Abb. 4.

ARTICLE X.

DEFENDANT'S REMEDY AGAINST ERROR.

Section 1. Non-joinder of parties defendant. It is the right of a party who is sued to require that any other person jointly liable with him for the debt shall be made a co-defendant. The omission of a plaintiff to sue all the joint contractors, in an action on a joint contract may be set up as a defense, and will furnish a complete defense to the suit. *Wooster v. Chamberlin*, 28 Barb. 602. The remedy of the defendant, against an omission on the part of the plaintiff to join all necessary parties defendant, is by demurrer where the defect appears upon the face of the complaint, and by answer where it does not so appear. Code, §§ 144, 147; *Eaton v. Balcom*, 33 How. 80; *Brainard v. Jones*, 11 id. 569; *Scofield v. Van Syckle*, 23 id. 97. But before the defendant can demur for want of parties, it must appear that his interest requires that such other party should be made a defendant. *Newbould v. Warrin*, 14 Abb. 80; *Hillman v. Hillman*, 14 How. 456. In determining whether a demurrer for a defect of parties is well taken, the rule as given in section 122 of the Code should be applied. If the court can determine the controversy before it without prejudice to the rights of others, or by saving their rights, then a demurrer for non-joinder of such parties is not well taken. But if, on the other hand, a complete determination of the controversy cannot be had without the presence of other parties, then the demurrer is well taken. *Wallace v. Eaton*, 5 How. 99; S. C., 3 Code R. 161. See *Jones v. Felch*, 3 Bosw. 63.

Section 2. Misjoinder of parties defendant. The joinder of too many parties as defendants, when there is no misjoinder of subjects, is not a ground of demurrer by any one of them against whom the plaintiff states a good cause of action. *New York & New Haven R. R. Co. v. Schuyler*, 17 N. Y. (3 Smith) 592, 604. A demurrer will not lie under subdivision 4 of section 144 of the Code for a misjoinder of parties. *Richtmyer v. Richtmyer*, 50 Barb. 55; *People v. Mayor of New York*, 8 Abb. 7; S. C., 28 Barb. 240; 17 How. 56; *Pinckney v. Wallace*, 1 Abb. 82. But if it

Change of parties — By death.

appears upon the face of the complaint that no cause of action is stated in the complaint as to one of the defendants, he may make this the ground of a special demurrer to the complaint under subdivision 6 of that section, as not stating facts sufficient to constitute a cause of action as to him. If the objection is not raised by demurrer, or does not appear upon the face of the complaint, it may be raised upon the trial and the complaint may be dismissed as to the defendant against whom no cause of action is stated. *Palmer v. Davis*, 28 N. Y. (1 Tiff.) 242; *Brownson v. Gifford*, 8 How. 389. This will in no way affect the other parties to the action, except that it will impose upon the plaintiffs the necessity of paying the costs of the defendant unnecessarily joined.

.. ARTICLE XI.

CHANGE OF PARTIES.

Section 1. By death.

a. Death of sole plaintiff under former practice. Under the former practice, the death of one of several plaintiffs before a verdict had been rendered in the action, or between the rendition of such verdict and a judgment thereon, did not have the effect of abating the action, if the cause of action survived to the surviving plaintiffs. So the death of one of several defendants, when occurring before a final judgment, did not abate the action, but, on the suggestion of such death on the record, the action might proceed against the surviving defendants. In the same manner the action might be continued by the surviving plaintiffs. 2 R. S. 386, § 1 (401).

So, if a sole plaintiff died after an interlocutory judgment, and before a final judgment obtained thereon, the action did not abate if it might have been originally prosecuted by the executors or administrators of the plaintiff; but a *scire facias* might issue in behalf of such executors or administrators against the defendant to show cause why the damages in such action should not be assessed and recovered. 2 R. S. 386, § 2 (402). The same rule applied on the death of a sole defendant at the same stage of the action; and the plaintiff might have a *scire facias* against the executors or administrators of such defendant to show cause why the damages in such action should not be assessed and recovered. 2 R. S. 387, § 3 (402).

Under the Code — Death of parties.

The statute also provided that after a verdict had been rendered in an action, and after a plea of confession in a suit brought, if either party died before judgment had been actually entered thereon, the court might, within two years after such verdict or plea, enter judgment in the names of the original parties. *Ib.* § 4.

But the statute did not authorize the entry of a judgment against any party who may have died before a verdict has been actually rendered against him, but declared all judgments so entered void. *Ib.* § 5.

The statute also declared in what manner proceedings for the partition of lands could be continued after the death of one or more plaintiffs or defendants; and also declared the effect of the marriage of a female plaintiff or defendant on an action pending, and prescribed the manner in which an action commenced by a public officer, in his official capacity, might be continued after his death.

b. Under the Code. The Code has provided for the same class of cases by declaring that no action shall abate by the death, marriage or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue; but that, in case of death, marriage or other disability of a party, the court, on motion, at any time within one year thereafter, or afterward on a supplemental complaint, may allow the action to be continued by or against his representative or successor in interest. Code, § 121.

Under this provision of the Code, the representatives of a deceased sole plaintiff may be substituted in the place of the deceased in every case where the cause of action survives. *Potter v. Van Vranken*, 36 N. Y. (9 Tiff.) 619; S. C., 2 Trans. App. 73.

But until this substitution has been properly effected, no further proceedings can be had in the cause, nor can any judgment, order or decree be entered unless it would, in effect, put an end to the suit. Thus, where a plaintiff has moved to strike out the answer of the defendant, but has died between the hearing on the motion and the granting of the order by the court, the entry of an order striking out the answer, before an order has been obtained reviving the suit in the name of the proper party, will be not only unauthorized but void. But where a cause has been submitted on a final hearing, and the parties have been

When a cause of action survives or continues.

fully heard, and there is nothing more to be done by either party in the presentation or defense of the cause, the court, being possessed of the whole case, may make its decree; and if, after that, something remains to be done, as to enforce the decree, there must be a revivor. *Reed v. Butler*, 11 Abb. 128; *Scranton v. Baxter*, 3 Sandf. 660; S. C., 1 Code R. N. S. 88; *Kissam v. Hamilton*, 20 How. 369; *Burhans v. Burhans*, 10 Wend. 602; *Ehle v. Moyer*, 8 How. 244. Judgment may be entered upon a report of a referee, although the plaintiff die between the signing of the report and the entry of judgment; but judgment could not be entered on a report unsigned at the time of the plaintiff's death. *Ib.* So, after a regular decree in a foreclosure suit, the referee may go on and sell the premises in pursuance of the decree, and execute a deed to the purchaser, though the plaintiff die before the completion of the sale and the execution of the deed. *Lynde v. O'Donnell*, 12 Abb. 286; S. C., 21 How. 34. So an execution may be enforced after the death of a plaintiff, without revivor, if the execution had been previously delivered to the sheriff, even though no actual levy had been made at the time of such death. See *Center v. Billinghamurst*, 1 Cow. 33; *Becker v. Becker*, 47 Barb. 497; *Bellinger v. Ford*, 14 id. 250. See *Lynde v. O'Donnell*, 12 Abb. 286; S. C., 21 How. 34.

c. *When a cause of action survives or continues.* The provisions of the Code in relation to the revival of an action after the death of a party are in all cases qualified by the modifying clause, "if the cause of action *survive* or *continue*." A cause of action survives to the personal representatives of a deceased plaintiff, in all cases where the act or omission which forms the subject of the action has injuriously affected the *estate* of the deceased. This rule applies to actions *ex delicto* as well as to actions *ex contractu*. Thus, it is provided by statute, that for wrongs done to the property, rights or interests of another, for which an action might be maintained against the wrong-doer, such action may be brought by the person injured, or, after his death, by his executors or administrators against such wrong-doer, and after his death against his executors or administrators, in the same manner and with like effect, in all respects, as actions founded upon contracts. 2 R. S. 447, § 1 (467).

But the statute expressly limits the application of the above provision by providing that these provisions shall not extend to actions for slander, for libel, or to actions of assault and battery

Forms — Death of plaintiff, etc.

or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff, or to the person of the testator or intestate of the executor or administrator. 2 R. S. 448, § 2 (467).

The construction of this statute has already been given in a previous section. See *Parties Plaintiff*, ante, 91, 92, 94; *Haight v. Hayt*, 19 N. Y. (5 Smith) 464; *Graves v. Spier*, 58 Barb. 349; *Fried v. N. Y. Central R. R. Co.*, 25 How. 285; *Doedt v. Wiswall*, 15 id. 128; *Yertore v. Wiswall*, 16 id. 8.

An action *continues* to a representative or successor in interest whenever the right of action vests by law, on the death of a plaintiff, in the surviving owners of the same demand. Thus, in an action brought by a partnership the cause of action does not go to the personal representatives of a deceased plaintiff, but remains or continues in the surviving plaintiffs. See *Taylor v. Church*, 9 How. 190; S. C., 12 N. Y. Leg. Obs. 156; *Williamson v. Moore*, 5 Sandf. 647.

FORMS.

The following forms of affidavits and orders may be useful on an application for an order continuing an action after the death of a sole plaintiff:

Affidavit of the Death of a Plaintiff, and Appointment of Executors.

(Title of cause.)

COUNTY OF _____, ss.

(John Doe) of (_____) being duly sworn, says:

I. That, on or about the _____ day of _____, 187____, one A. B. commenced an action in this court for (state the cause of action).

II. That after this action was commenced and (state condition of the action), to wit, on the _____ day of _____, 187____, the above-named plaintiff, A. B., died,* after having made and published his last will and testament, in which he appointed this deponent his sole executor.

III. That, on the _____ day of _____, 187____, the surrogate of the county of (_____) duly issued letters testamentary to this deponent, and that he has entered upon the execution of his duties as executor aforesaid.

(Jurat.)

JOHN DOE.

Forms — Death of plaintiff, etc.

Affidavit of Death of Plaintiff and Appointment of Administrators.

[Same as previous form to the word "died"* intestate.]

III. That afterward, to wit, on the day of
187 , letters of administration upon the estate of the said A. B.,
deceased, were duly made and issued by the surrogate of the
county of to the deponent, and (Mary Doe).

IV. That the deponent and the said (Mary Doe) have qualified
and have entered upon their duties as such administrators.

• (Jurat.)

(Signatures.)

Affidavit of Death of Plaintiff and Succession of Devisees.

[Same as form first given, to and including the words "will
and testament,"] in due form of law; whereby he devised to this
deponent all his right, title and interest in and to the real estate
in question in this action.

(Jurat.)

(Signature.)

Affidavit of Death of Plaintiff and Succession of Heirs.

[Same as in second affidavit given, to and including the word
"intestate,"] leaving this deponent his sole heir at law.

(Jurat.)

(Signature.)

The proceedings, upon motion for leave to continue an action
in the name of the representatives of a deceased plaintiff, are
given in a following section, where the necessary notice is also
discussed. See section 8, subdivision b, *post*.

Notice of Motion for Leave to Continue.

(Title of cause.)

Please take notice: That, on the affidavit, a copy of which is
herewith served upon you, and upon the pleadings in this
action, I shall apply to this court, at a special term to be held at
the , in the , on the day of ,
at o'clock in the noon, or as soon thereafter as coun-
sel can be heard, for leave to continue this action in the name of
John Doe (executor or administrator, etc.,) of A. B., deceased,
as plaintiff, or for such other or further relief as may be just.

Yours, etc.,

(Date.)

C. T. BOONE,

Attorney for above-named Executor, etc.

To DONALD McMARTIN, Esq.,

Defendant's Attorney.

Forms — Order continuing action.

The plaintiff's attorney should also prepare the usual affidavit of service, to be annexed to the notice, and ready to be presented to the court with the other moving papers. He should also prepare an order directing the continuance of the suit in the name of the representative of the deceased plaintiff. If the motion is opposed, the order should be in the following form :

*Order Continuing the Action.**(Title of cause.)**(Caption.)*

On reading and filing the affidavit of (John Doe), and on motion of (C. T. Boone), of counsel for the (executor or administrator, etc.), of A. B., deceased, plaintiff in this action, and after hearing (Donald McMartin), of counsel for the defendant :

ORDERED : That this action be continued in the name of (John Doe, executor) of the said A. B., deceased, as plaintiff; and that the said (executor or administrator, etc.,) be and he hereby is substituted in the place and stead of the said A. B., deceased.

*Same order when motion is unopposed.**(Title of cause.)**(Caption.)*

On reading and filing the affidavit of (John Doe), and also the affidavit of due service of the same, with notice of this motion, on the attorney for the defendant, and no one appearing to oppose, on motion of (C. T. Boone), of counsel for the (executor) of A. B., deceased.

ORDERED : (As in the above.)

d. In actions founded on torts. The Code provides that, after a verdict has been rendered in any action for a wrong, such action shall not abate by the death of any party, but the case shall proceed thereafter in the same manner as in cases where the cause of action now survives by law. Code, § 121. This provision of the Code limits the application of the maxim, that actions for personal injuries die with the person, to cases where the death of the plaintiff occurs before judgment, and gives to the personal representatives of the deceased in all other cases the same right to revive the action, and to proceed to enforce the judgment, that is given by statute in actions upon contracts.

e. Actions where public officers are plaintiffs. The death of a public officer or his removal from or resignation of the office held by him, or the expiration of his term of office, will not have the effect of discontinuing or abating an action brought by or against him in his official capacity. The court in which the

Forms — Succession to public office.

action is pending may substitute the name of the successor of such officer, either upon the application of such successor or of the adverse party. 2 R. S. 474, § 100 (496).

This application is optional with either party. If neither elect to make the application the case may continue to be prosecuted by or against the original parties. *Manchester v. Herrington*, 10 N. Y. (6 Seld.) 164; *Colegrove v. Breed*, 2 Denio, 125. It is also provided by statute that, when an action is authorized or directed by law to be brought by or in the name of a public officer, or by any trustee appointed by virtue of any statute, his death or removal shall not abate the suit, but the same may be continued by his successor, who shall be substituted for that purpose by the court, and a suggestion of such substitution shall be entered on the record. 2 R. S. 388, § 14 (403). Thus, where a sheriff dies pending an action prosecuted in his name, under section 288 of the Code, the successor in office of the sheriff should be substituted under this provision of the statute, instead of the personal representatives of the deceased, or the claimant for whose benefit the action is brought. *Orser v. Glenville Woolen Co.*, 11 Abb. N. S. 85. Cases of this nature are not provided for by section 138 of the Code. *Ib.*

Affidavit of Succession to a Public Office.

(Title of cause.)

COUNTY OF _____, ss.

A. B., of _____, being duly sworn, says:

I. That he is the attorney of the plaintiff (or defendant) in the above entitled action.

II. That on the _____ day of _____, 187____, C. D., of _____, was duly elected (or appointed) to the office of _____, of the _____, county of _____, in the place of _____ (the defendant E. F.), and that on the _____ day of _____, 187____, the said C. D. entered upon the duties of said office, and still holds the same.

A. B.,

(Jurat.)

Attorney for the (plaintiff.)

Notice of Motion.

(Title of cause.)

Please take notice: That, on the affidavit (or certificate) of which a copy is herewith served, I shall apply to this court, at a special term to be held at _____, on the _____ day of _____, 187____, at _____ o'clock in the forenoon, or as soon thereafter as counsel can be heard, to substitute C. D. (give

[Order for substitution — Death of one of several plaintiffs.]

official designation) in the place of E. F. as defendant (or plaintiff) in this action; and for such other and further relief as to the court may seem just.

A. B.,
Attorney for the (plaintiff.)

(Date.)
To G. H.,
Attorney for E. F.
Or, (To C. D., when motion is made by adverse party.)

Order for Substitution.

(Title of cause.) (Caption.)

On reading and filing the affidavit of A. B. (and on proof of due service of a notice of this motion), and, on motion of A. B., after hearing G. H. (or no one appearing) in opposition:

ORDERED: That C. D., of (give official designation), be substituted as (defendant) herein in place of E. F. (and he is hereby required to appear and answer the complaint in this action within days after service of a copy of this order.)

Section 2. Death of one of several plaintiffs.

a. In an action on a joint demand. It was a well-established rule of the common-law practice and pleading that, in all actions *ex contractu*, in which one or more of several parties having a joint legal interest died, whether such parties were or were not, in the commercial sense of the term, copartners, the action could only be maintained in the name of the survivors. So, also, in actions *ex delicto* for injuries to personal property, joint tenants and tenants in common must join, and on the death of one of the number, the action must be continued in the name of the survivor alone, and the executor of the deceased could neither be joined with such survivor nor sue separately. This rule has not been changed by the Code. *Bucknam v. Brett*, 22 How. 233; S. C., 35 Barb. 596; 13 Abb. 119. See 2 R. S. 386, § 1 (401).

On the death of one of several plaintiffs having a joint legal interest, no order of substitution is necessary, as the action may be continued by the survivors. But it is necessary to inform the court why the name of the deceased is omitted, and this may be done by spreading upon the records of the court a suggestion of death as provided in the Revised Statutes. *Taylor v. Church*, 9 How. 190; S. C., 12 N. Y. Leg. Obs. 156. See 2 R. S. 386, § 1 (401). The surviving plaintiffs, on the death of a co-

Suggestion of death — Answer to the above.

plaintiff, will be clearly in error in attempting to proceed in the name of the deceased instead of making the proper suggestion of death upon the record. For, should the defendants succeed in their defense, no valid judgment could be entered against the deceased party, because the judgment would necessarily be joint, and if irregular as to the deceased party, it would be irregular as to all the plaintiffs. *Holmes v. Honie*, 8 How. 383.

Suggestion of Death.

(*Title of cause.*)

A. B., one of the plaintiffs in this action, by (C. T. Boone) his attorney, hereby gives the court to understand that, since the commencement of this action, to wit, on or about the day of _____, 187____, C. D., one of the plaintiffs herein, died; and that the cause of action survives to him, the said A. B.

C. T. BOONE,
Attorney for A. B.

(*Date.*)

Answer to the above.

(*Title of cause.*)

E. F., defendant in this action, as an answer to the suggestion of A. B., one of the plaintiffs herein, denies that the above-named C. D. is dead.

BORDEN D. SMITH,
Defendant's Attorney.

(*Date.*)

Although no order reviving an action is strictly necessary in the cases above mentioned, there is no impropriety in following the old chancery practice by procuring an order directing the action to continue between the survivors. See *Lachaise v. Libby*, 13 Abb. 6; S. C., 21 How. 363; *Greene v. Bates*, 7 id. 296; *Leggett v. Dubois*, 2 Paige, 211.

b. In equitable actions. The rule is clear, that in legal actions, upon a joint demand, the representatives of a deceased party plaintiff can neither be joined with the survivors, nor can they sue alone. *Bucknam v. Brett*, 13 Abb. 119; S. C., 35 Barb. 596; 22 How. 233. But it is held that, in equitable actions, where the plaintiffs claim several interests, and one dies before judgment, if the cause of action does not survive, but continues to the survivors, they may proceed without reviving the suit, or may, at their election, make the representatives of the deceased co-plaintiff defendants. But, if the defendants consider it nec-

Petition to revive an action after decease of a plaintiff.

essary or expedient to bring the representatives of the deceased complainant into court, they may have an order requiring such representatives to show cause why the suit should not stand revived in their names or the complaint dismissed so far as the interests of such representatives are concerned. *Williamson v. Moore*, 5 Sandf. 647.

Proceedings for the partition of lands do not abate on the death of one or more plaintiffs or one or more defendants. If one of several plaintiffs dies, the proceedings must be continued in the name of the survivors, if the interest in the land survived to them, and if such interest pass to other persons, they may be made defendants by rule of court, and the same proceedings may be had against them as would be necessary to make them defendants originally. 2 R. S. 387, § 6 (402). See *Wilkinson v. Parish*, 3 Paige, 653.

Petition by a Defendant to revive an Action after decease of a Plaintiff.

(Title of cause.)

To the Supreme Court of the State of New York:

The petition of (Richard Roe), the defendant above named, respectfully shows to the court:

I. That, on or about the day of , 187 , A. B. and C. D. commenced an action, in this court, against this defendant, for (*state cause of action and its condition*).

II. That, as your petitioner is informed and believes, A. B., one of the plaintiffs above named, died on or about the day of , 187 .

III. That, before his death, he made and published his last will and testament, in which, among other things, he appointed E. F. his sole executor.

IV. That the said E. F. has duly proved the said will, and has received letters testamentary from the surrogate of , and has entered upon the execution thereof.

V. That the said E. F. has hitherto neglected to appear, or to apply to the court for leave to appear, as plaintiff, in the place and stead of said A. B., deceased.

Wherefore, your petitioner prays that the court will order the said E. F. to show cause, at a certain day to be named in the order, why this action should not be revived in his name, or the complaint herein be dismissed, so far as his interests are concerned, and that your petitioner have judgment thereupon against the said E. F., as executor, as aforesaid, for the costs of this action, or for such other or further order as may be just.

(Date.)

RICHARD ROE.

A. B. MOORE, Attorney.

Order to show cause — Order granting the prayer of the petition.

COUNTY OF _____, ss.:

Richard Roe, being duly sworn, says that he has read (or heard read) the foregoing petition, subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

RICHARD ROE.

(*Jurat.*)

Order to show cause.

(*Title of cause.*)

(*Caption.*)

On reading and filing the petition of (Richard Roe), defendant in this action, and on motion of (A. B. Moore), attorney for the same.

ORDERED: That E. F., executor of A. B., late plaintiff in this action, now deceased, show cause, at a special term of the court, to be held at _____, in the _____, on the _____ day of _____, 187____, at _____ o'clock in the forenoon, why this action should not stand revived, in his name, as executor as aforesaid, or why the complaint should not be dismissed, so far as the interests of said executor are concerned, with costs.

MORTIMER WADE,
Clerk.

This order should be served on the attorney for the plaintiff and the executor eight days before the time fixed for showing cause. The defendant's attorney should be prepared with proof of such service, to be used upon the motion, if the executor fails to appear. He should also be prepared with an order, properly drawn, granting the prayer of the petition, to be signed and entered by the clerk if the petition is granted.

Order granting the prayer of the petition.

(*Title of cause.*)

(*Caption.*)

On reading and filing the affidavit of service on E. F., executor of A. B., deceased, late plaintiff in this action, of a copy of an order made herein, on the _____ day of _____, last, requiring him to show cause, before this court, on this day, why this action should not stand revived in his name, or the complaint dismissed, so far as his interests are concerned, and the said E. F. not appearing to show cause (*or no cause being shown*) to the contrary, on motion of A. B. Moore, attorney for defendant,

ORDERED: That this action be and the same hereby is revived in the name of the said E. F., as executor as aforesaid (*or that the complaint herein be dismissed*, so far as the interests of the said E. F. are concerned, with leave to the defendant to enter

Affidavit of death of defendant, etc. — Notice of motion, etc.

judgment against the said E. F., as executor, for the costs of this action, with dollars, costs of this motion).

MORTIMER WADE,
Clerk.

A. B. MOORE,
Attorney for Defendant.

Affidavit of death of Defendant and Appointment of Executor.
(*Title of cause.*)

COUNTY OF , ss :

John Doe, of the county of , being duly sworn, says:

I. That on or about the day of , 187 , he commenced an action in this court against Richard Roe, the defendant above named, for (*state cause of action and its condition*).

II. That on or about the day of , 187 , said defendant died, as deponent is informed and believes, having first made and published his last will and testament in which, among other things, he appointed William Roe of his executor.

III. That on or about the day of , 187 , the surrogate of issued letters testamentary to said William Roe, who thereupon entered upon the execution of his duties as executor.

IV. That said action is still pending and undetermined, and no proceedings to continue the same have been taken to the knowledge of the deponent.

(*Jurat.*)

JOHN DOE.

Notice of motion to continue action against Executor of Deceased Defendant.

(*Title of cause.*)

Please take notice: That on the affidavit of which a copy is herewith served upon you, and upon the pleadings in this action, I shall apply to this court at a special term to be held at the , in the , on the day of , at o'clock, in the . noon, or as soon thereafter as counsel can be heard, for leave to continue this action against William Roe, as executor of Richard Roe, deceased, in the place of said deceased defendant; and for such other and further relief as to the court may seem just, with the costs of this motion.

(*Date.*)

C. M. PARKE,
Plaintiff's Attorney.

To A. P. SPRAGUE, Esq.,
Defendant's Attorney.

To WILLIAM ROE, *Executor.*

Order to continue action, etc. — Death of sole defendant.

Order to Continue action against Executor of Deceased Defendant.

(Title of cause.)

(Caption.)

On reading and filing the affidavit of John Doe, plaintiff, and on motion of C. M. Parke, of counsel for the plaintiff, after hearing A. P. Sprague, of counsel (for the late defendant and) for William Roe, executor.

ORDERED: That William Roe, the executor of the above-named Richard Roe, late defendant in this action, now deceased, appear and answer the complaint herein, within eighty days from the service of a copy of this order upon him; or, that in default thereof, the plaintiff may apply to the court for an order entering his appearance, and directing the action to stand revived and continued against him as executor of the said Richard Roe* and that the answer of said Richard Roe be then deemed the answer of the said William Roe, executor as aforesaid (*or where no answer has been served, omit the words following the * and insert*), and that he then have judgment for failure to answer.

This order is framed in accordance with the provisions of sections 109, 112, of 2 R. S. 185, as the Code fails to provide a mode for compelling the appearance of a representative who refuses to continue the defense in an action against the deceased defendant.

Section 3. Death of sole defendant.

a. In general. The provision of the Code, as to the abatement of actions, applies equally to all parties — plaintiff or defendant — and the general rules given in relation to proceedings in an action on the death of a sole plaintiff are generally applicable to proceedings on the death of a sole defendant. See § 1, *ante*, 140, 142.

b. Effect of the death of a sole defendant in an action for personal injuries. The Code provides, that, when the cause of action survives or continues, the action will not abate on the death of the defendant, but may be continued against his personal representatives. Code, § 121. The cases in which a cause of action survives to or against the personal representatives of a deceased party have been already discussed. See 2 R. S. 447, §§ 1, 2 (467); see, also, § 1, *ante*, 142, sub. c.

But there are cases in which an action survives to, but not against, the personal representatives of a deceased party. Thus, an action of replevin does not abate on the death of a sole plaintiff, but may be revived in the name of the representatives of the deceased. But on the death of a sole defendant in replevin the

Death of one of several defendants.

action wholly abates, and the court has no power to order the action to be continued against the personal representatives of the defendant. *Hopkins v. Adams*, 5 Abb. 351; S. C., 6 Duer, 685; *Lahey v. Brady*, 1 Daly, 443; *Potter v. Van Vranken*, 36 N. Y. (9 Tiff.) 619; S. C., 2 Trans. App. 73; *Mosely v. Mosely*, 11 Abb. 105; *Moseley v. Albany Northern Railroad Co.*, 14 How-71; *Kissam v. Hamilton*, 20 id. 369. See *Waldorph v. Bortle*, 4 id. 358.

After a verdict has been rendered in any action for a wrong, the death of the defendant will not cause the action to abate, but the case may proceed thereafter in the same manner as in cases where the cause of action now survives by law, even though the cause of action is not such as would, under the statute, survive against the personal representative of the defendant. See Code, § 121; *Wood v. Phillips*, 11 Abb. N. S. 1.

c. *In actions of ejectment.* The principles laid down in this section, in relation to actions for the recovery of personal property, apply also to actions for the recovery of the possession of real property, and the authorities there cited establish the rule that actions of ejectment abate on the death of the sole defendant therein, and cannot be revived against the personal representatives of the deceased.

d. *Actions against public officers.* As to the rule in relation to the abatement of actions against public officers see § 1, sub. e, ante, 146; see, also, *Orser v. Glenville Woolen Co.*, 11 Abb. N. S. 85.

Section 4. Death of one of several defendants.

a. *In actions on a joint liability.* Upon the death of one of several defendants in an action upon a joint liability, the suit should be continued against the surviving defendants. The death of one of several parties jointly liable does not abate the action, and it must be continued against the survivors alone, as it is not generally proper in an action at law to join the legal representatives of a deceased joint debtor as defendants with the surviving debtors. *Fine v. Righter*, 3 Abb. N. S. 385; *Voorhis v. Child's Executor*, 17 N. Y. (3 Smith) 354. See *Mc Vean v. Scott*, 46 Barb. 379; *Union Bank v. Mott*, 27 N. Y. (13 Smith) 633; *Richler v. Poppenhausen*, 42 N. Y. (3 Hand) 373; S. C., 9 Abb. N. S. 263. An action may be maintained against the representatives of a deceased partner upon a partnership liability, when it is proved that the surviving partner is wholly insolvent, with-

 Death of a judgment debtor.

out first exhausting the remedy at law against him. *Riper v. Poppenhausen*, 43 N. Y. (4 Hand) 68.

It will be the safer practice also to procure an order of the court directing the action to proceed against the survivors, even if such order is not strictly necessary. See *Gardner v. Walker*, 22 How. 405; *Taylor v. Church*, 9 id. 190; S. C., 12 N. Y. Leg. Obs. 156; *Lachaise v. Libby*, 13 Abb. 6; S. C., 21 How. 362. Where the parties are not partners, and the liability is joint and several, the survivor and the representatives of one of the deceased debtors cannot be joined in the same action. *Mc Vean v. Scott*, 46 Barb. 379.

b. In an action upon a joint and several liability In all actions upon a joint and several liability the plaintiff has a right to elect whether he will proceed against the defendants severally, or, treating the obligation as joint, proceed against all jointly in one action. If he elects to treat the liability as joint, and after the action is commenced and before judgment one of the defendants dies, the plaintiff may treat the action as abated as against the deceased defendant, and proceed regularly against the remaining defendants. *Gardner v. Walker*, 22 How. 405. He should, as a precautionary measure, procure an order directing the action to so proceed. He cannot proceed against the personal representatives of the deceased defendant and the survivors jointly, as a joint verdict or a joint judgment in such a case would be erroneous. But he may have an order reviving the suit against the representatives of the deceased and also against the surviving parties, but not as a joint action. The plaintiff in all such cases must sever the action, and proceed against the survivors and representatives separately from the time of the death of the defendant. An order reviving an action on a joint and several liability will be construed in accordance with this rule. *Union Bank v. Mott*, 27 N. Y. (13 Smith) 633; *Mc Vean v. Scott*, 46 Barb. 379; *Gardner v. Walker*, 22 How. 405. See *Fine v. Richter*, 3 Abb. N. S. 385.

Section 5. Death of a judgment debtor.

a. In supplementary proceedings. No proceedings supplementary to execution can be commenced or continued after the death of a sole defendant until his representatives are brought in as parties. *Hazewell v. Penman*, 13 How. 114; S. C., 2 Abb. 230.

Death of a party to an appeal — Civil death — Change, how made.

Section 6. Death of a party to an appeal. In all cases in which an appeal is pending at the time of the death of a sole defendant, the personal representatives of the deceased, having an interest in the judgment recovered, and in the appeal therefrom, are entitled as a right to be made parties to the appeal, whether the judgment appealed from was in favor or against the deceased party, whom they represent. *Schuchardt v. Remiers*, 28 How. 514; S. C., 1 Daly, 459; *Miller v. Gunn*, 7 How. 159. See *Beach v. Gregory*, 2 Abb. 203. When a party to a cause dies after the return is filed in the court of appeals, the court, having obtained jurisdiction, has power to allow the legal representatives of the deceased to be substituted. *Hastings v. McKinley*, 8 How. 175. The provision of the Code has no application to the substitution of new parties on an appeal to the court of appeals. *Ib.*

Section 7. Civil Death.

a. Effect of civil death on actions pending. A person sentenced to imprisonment in a State prison for life is thereafter to be deemed civilly dead. 2 R. S. 701, § 20 (724). The rights and liabilities of such a person are as entirely gone as though he were actually dead; and his estate may be administered upon in the same manner as if he were actually a corpse. The rules applicable to the abatement and revivor of actions in cases of actual death apply equally to cases of civil death. If the cause of action survive or continue, it may be revived in the name of the personal representatives of the party imprisoned. *Freeman v. Frank*, 10 Abb. 370.

Imprisonment in a State prison for any term less than life suspends all the civil rights of the person so sentenced, and consequently abates any suit in which such person is plaintiff, so that no further proceeding can be had therein, until the action is properly revived. *O'Brien v. Hagan*, 1 Duer, 664. But the conviction and sentence of a party defendant to a State prison does not affect an action pending. *Davis v. Duffie*, 4 Abb. N. S. 478; S. C., 3 Trans. App. 54; 3 Keyes, 606; affirming 8 Bosw. 617; reversing 18 Abb. 360.

Section 8. Change, how made.

a. When an order of revival is the proper remedy. When an action has abated by the death of a party, and the cause of action survives or continues, the proper manner of effecting a change of parties by the substitution of the personal representatives, or successors in interest of the deceased, is by application

How, where, and by whom, an order may be obtained.

to the court for an order directing such substitution, provided always that such motion is made within one year from the time of the death of the party. *Allen v. Walter*, 10 Abb. 379; *Coon v. Knapp*, 13 How. 175; *Gordon v. Sterling*, id. 405; *Green v. Bates*, 7 id. 296. After a year has elapsed since the death of the party, an application by motion is no longer proper, and the suit can only be continued by filing a supplemental complaint. No application to the court for permission to file this complaint is necessary or proper. It is a matter of strict right. *Matter of Bornsdorff v. Lord*, 41 Barb. 211; S. C., 17 Abb. 168; *Roach v. La Farge*, 43 Barb. 616; S. C., 19 Abb. 67. This last method of obtaining a substitution of parties will be treated in a subsequent part of this work. See Pleading, Supplemental Complaint.

b. How, where, and by whom, an order of revival may be obtained. On the death of a sole plaintiff, the personal representatives of the deceased are the proper parties to apply to the court for leave to continue the action. *Jarvis v. Felch*, 14 Abb. 46. See note to *Allen v. Walter*, 10 id. 381. But it is provided by the amendment to the Code in 1862, that at any time after the marriage or other disability of the party plaintiff, the court in which the action is pending, upon notice to such persons as it may direct, and upon application of any person aggrieved, may, in its discretion, order that the action be deemed abated unless the same be continued by the proper parties, within a time to be fixed by the court, not less than six months nor exceeding one year from the granting of the order. Code, § 121. This amendment renders the practice, indicated in prior decisions on this point, obsolete as authority. See *Jarvis v. Felch*, 14 Abb. 46; *Williamson v. Moore*, 5 Sandf. 647; *De Agreda v. Mantel*, 1 Abb. 130, 140. On the death of one of several plaintiffs, in an action at law, no order reviving the suit between the survivors need be obtained; but such order may nevertheless be obtained on the application of either party. *Lachaise v. Libby*, 21 How. 362; S. C., 13 Abb. 6; *Taylor v. Church*, 9 How. 190; S. C., 12 N. Y. Leg. Obs. 156.

But, where a sole defendant dies pending an action, and before judgment, his personal representatives have no right to an order requiring the plaintiff to continue the action against them. It is the privilege of the plaintiff, in such cases, to elect whether to make them parties in the place of the deceased defendant, or to

How, where, and by whom, an order may be obtained.

require that the action be discontinued. *Keene v. La Farge*, 16 How. 377; S. C., 1 Bosw. 671; *Kissam v. Hamilton*, 20 How. 369, 377; *Hopkins v. Adams*, 5 Abb. 351; S. C., 6 Duer, 685.

But after judgment, and on appeal, the personal representatives of the deceased may insist on being made parties as a matter of right. *Schuchardt v. Remiers*, 28 How. 514; S. C., 1 Daly, 459. And when an intestate, not being an inhabitant of the State, dies out of this State, without leaving assets therein, and there is pending in the supreme court, or in the court of appeals, an appeal brought by such intestate from a judgment against him, the court in which such appeal is pending may order the judgment appealed from affirmed, with costs, unless the attorney for the intestate on such appeal procure the action to be revived within six months after notice to perfect such appeal by the substitution of a representative of the intestate in this action. Code, § 121.

On the death of one of several defendants, the plaintiff is usually the proper person to apply for an order reviving the suit. See *Union Bank v. Mott*, 27 N. Y. (13 Smith) 633. But, on the failure of the plaintiff to bring in the personal representatives of the deceased, the surviving defendant may move that the complaint be dismissed as against him, unless the plaintiff continue the action against the persons representing the interest of the deceased defendant. *Chapman v. Foster*, 15 How. 241.

It is usual and advisable in all cases to give notice of an application for a change of parties, to all parties in interest. *Gordon v. Sterling*, 13 How. 405; *Howard v. Taylor*, 11 id. 380; S. C., 5 Duer, 604. See *McGown v. Leavenworth*, 2 E. D. Smith, 24; *Terry v. Roberts*, 15 How. 65. Generally speaking, at least eight days' notice of motion should be given, where no shorter time is prescribed by an order to show cause. Code, § 402. But where a change of parties becomes necessary in actions against public officers, on account of death, or the other causes specified by statute, at least fourteen days' notice must be given of an application to substitute a successor in office, and this notice must be personally served on such new defendant. 2 R. S. 474, § 101 (496), Edm. ed. The motion should be made at special term, and is brought on to be heard in the same manner as other motions. The moving party should support his application by affidavits showing *prima facie*, a succession to that interest by the party sought to be substituted. *St. John v. Croel*, 10 How.

Effect of a transfer of the interest of a sole plaintiff.

253. The adverse party may, on their part, litigate this question by opposing affidavits or other proof. But the merits of the action cannot be tried upon the motion. *Wing v. Ketcham*, 3 How. 385; S. C., 2 Code R. 7. If the affidavits of the moving party establish the fact of the death of the original party, and the succession to that interest by the party to be substituted, the court will make the requisite order.

c. Effect of the order. It was formerly customary in equitable actions, for the order of revivor to provide for giving the new parties the benefit and advantage of the proceedings already had in the action. But it is not now necessary that the order should contain any such provisions, in order to give effect to the prior proceedings in the cause. The legal effect of the order is, to authorize the continuance of the proceedings from the point at which they were interrupted by the death of the party, and to give to the parties substituted the benefit of the proceedings already had in the action. *Moore v. Hamilton*, 48 Barb. 120; 44 N. Y. (5 Hand) 666.

d. Appeals from the order. An order of revival allowing actions to be continued in the name of survivors, and substituting the representatives of the deceased parties, is appealable as affecting a substantial right. *St. John v. Croel*, 10 How. 253; Code, § 349; *Wilson v. Duncan*, 11 Abb. 3.

ARTICLE XII.

BY TRANSFER.

Section 1. Effect of a transfer of the interest of a sole plaintiff.

a. In general. The Code provides that, in case of any transfer of interest other than that resulting from the death, marriage, or other disability of a party, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action. Code, § 121. The effect of such transfer, therefore, is to give to the transferee the right to apply to the court for an order substituting himself in the place of the original plaintiff, to whose rights he has succeeded. If the transferee fails to apply to the court to be thus substituted as plaintiff, the action must be still continued in the name of the original plaintiff, as the transferee

 Effect of the transfer of the interest of one of several plaintiffs.

alone is authorized to make the application, and the defendant cannot compel him to become a plaintiff without his consent. *Packard v. Wood*, 17 Abb. 318; *Emmet v. Bowers*, 23 How. 300; *Howard v. Taylor*, 11 id. 380; S. C., 5 Duer, 604. Even on the application of the transferee, it is within the discretion of the court to allow or disallow the motion. Where a substitution cannot prejudice any right or remedy of the defendant, it is almost a matter of course to grant the motion. When the opposite result would be effected by the change, the court will either deny the motion or grant it on such terms as will protect the defendant from injury. *Howard v. Taylor*, 11 How. 380. No order of substitution will be made, unless special circumstances are shown to satisfy the court of its propriety or necessity. *Murray v. General Mutual Ins. Co.*, 2 Duer, 607. Neither can any order of the court, under section 121 of the Code, have the effect of substituting one who has the right to sue, for one who had no right to sue. *East River Bank v. Cutting*, 1 Bosw. 636. Neither can the assignee of a cause of action, who has been substituted on an *ex parte* application, acquire any greater rights than his assignor, nor avoid any liability to set-offs which existed against the demand while in the hands of the assignor. *Roberts v. Carter*, 24 How. 44; S. C. reversed, 38 N. Y. (11 Tiff.) 107; 6 Trans. App. 253. See S. C., 17 How. 341; *Terry v. Roberts*, 15 id. 65.

Section 2. Effect of the transfer of the interest of one of several plaintiffs. Where one of two tenants in common of personal property assigns his interest in an action for the conversion thereof to the defendant in the action, this transfer of interest will not abate the action so far as the other plaintiff is concerned, but the latter may proceed in the name of both plaintiffs, or amend by striking out the name of the plaintiff who has released his right of action. *Gock v. Keneda*, 29 Barb. 120. So where one plaintiff in an action transfers his interest to his co-plaintiff, and the assignee dies, the court may let in the personal representative of the deceased plaintiff, and yet deny his application to be allowed to prosecute as sole plaintiff. *Sheldon v. Havens*, 7 How. 268.

Petition of assignee of plaintiff's title to continue action in his own name.

(Name of court.)

In the matter of the petition of A. B.
to be substituted as plaintiff in an

 Petition by receiver — Notice of motion.

action pending between C. D., plaintiff, and E. F., defendant.

To the supreme court of the State of New York:

The petition of A. B. respectfully shows to the court:

I. That on or about the day of , 187 , C. D., the plaintiff above named, commenced an action in this court against one E. F. (*state the cause of action and its condition, including the proceedings had in the cause*).

II. That, after the commencement of said action, to wit, on the day of , 187 , the said C. D., plaintiff in said action, duly assigned and transferred (*state the property or nature of the interest assigned*) for a valuable consideration, to your petitioner, who is now the lawful owner and holder thereof.

III. That (*state the special circumstances that render the substitution necessary*), wherefore, your petitioner prays that he may be substituted as plaintiff in said action in the place of said C. D., and that the said action may be continued in his name, and that he may have such other and further relief as the court may deem just.

(*Date.*)

(*Signature.*)

(*Venue.*)

A. B., being duly sworn, says, that he has read (or heard read) the foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

(*Jurat.*)

(*Signature.*)

Petition by Receiver.

(The same as in preceding form to "II.")

II. That pending said action, to wit: on the day of , 187 , upon application duly made by W. M., a judgment creditor of said C. D., in proceedings supplementary to execution, your petitioner was, by the order of Hon. , one of the justices of the supreme court (or county judge for the county of), duly appointed receiver of the property of the said C. D.

Wherefore, etc. (as in preceding form).

Notice of Motion.

(*Entitled as in petition.*)

Please take notice: That on the annexed petition, and on the pleadings in this cause, I shall move the court at a special term to be held at , on the day of , 187 , at o'clock, in the forenoon, or as soon thereafter as counsel can be heard, for an order directing the action referred to in

Order for substitution — When other parties must be added.

the annexed petition, and heretofore pending in this court between C. D., plaintiff, and Y. Z., defendant, to be continued in the name of A. B., as plaintiff, in the place of C. D., plaintiff, above named; and granting the said A. B. leave to amend the complaint herein as he shall be advised and for such other and further relief as the court may deem just.

(Date.)

To P. Q.,

Attorney for Defendant.

R. L.,

Attorney for A. B.

Order for Substitution.

(Title of Cause.)

(Caption.)

On reading and filing the petition of A. B. and the pleadings in this action, and on motion of R. L., counsel for the said A. B., assignee (or receiver) of the plaintiff, and after hearing P. Q. of counsel for the defendant, in opposition,

ORDERED: That the above-entitled action be continued by A. B. as plaintiff herein, in the place of C. D., the plaintiff above named, and further, that he be allowed to amend the complaint as he shall be advised.

Section 3. Change, how effected. The change of parties in the case of a transfer of interest can be effected only on the motion of the transferee, as has been previously stated. The motion should be made at special term, and may be on notice or *ex parte*. The practice is similar to that on any other motion. The allowance or refusal of the order being within the discretion of the court no appeal therefrom is allowable. *McGown v. Leavenworth*, 2 E. D. Smith, 24.

ARTICLE XIII.

BY ADDITION.

Section 1. When other parties must be added.

a. In general. The Code authorizes the court to determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights. But it also provides, that, when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in. Code, § 122. The rule of the former court of chancery in relation to the addition of parties was almost identical with this provision of the Code. *Davis v. Mayor, etc., of New York*, 14 N. Y. (4 Kern.) 506. Under this section of the Code, if there

What interest original parties must have.

are any persons not parties, whose rights must be ascertained and settled before the rights of the parties to the suit can be determined, it becomes the imperative duty of the court to order such persons to be made parties before further progress in the action. *McMahon v. Allen*, 12 How. 39; S. C. affirmed, 3 Abb. 89; 1 Hilt. 103; *Powell v. Finch*, 5 Duer, 666; *Davis v. Mayor, etc., of New York*, 2 id. 663; *Waring v. Waring*, 3 Abb. 246. In such cases the court has no discretion. *Ib.* To place this question beyond a doubt, the legislature, by the amendment of 1851, changed the wording of the section, as originally passed, from the permissive to the imperative form; originally it was provided that "the court *may* order," etc. The amendment substituted *must* for *may*. *Shaver v. Brainard*, 29 Barb. 25.

b. What interest the original parties must have. The construction of this section must not be carried beyond its plain intent. It does not authorize an entire change of parties on either side, nor does it contemplate adding a party who has a right to sue, to a party who has no such right. The section applies only to cases where one or more of the original parties had such an interest in the controversy as would enable him to sustain the action, but where the controversy would not be completely settled without the presence of other parties. *Davis v. Mayor of New York*, 14 N. Y. (4 Kern.) 506. Thus the court will not allow the plaintiff to bring in a new party defendant, when the plaintiff's right to recover depends upon the presence of such party, as this would be equivalent to the commencement of a new action. *McMahon v. Allen*, 12 How. 39; S. C. affirmed, 3 Abb. 89; 1 Hilt. 103. Neither can the court order a plaintiff to sue a person against his will, where the introduction of such person as a party is not necessary to a decision of the questions involved in an action already commenced. Thus the court cannot compel the plaintiff, in an action against the indorsers of a promissory note, to bring in the other parties to the note, and convert a legal action in a suit in equity. *Sawyer v. Chambers*, 11 Abb. 110.

Section 2. In what cases the addition of parties is discretionary with the court.

a. In general. Where, in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in its subject-matter, makes application to the court

In what cases parties is discretionary with the court — Application, how made.

to be made a party, it *may* order him to be brought in by a proper amendment. Code, § 122. This provision of the Code, allowing a stranger to the suit to be made a party, is confined to actions for the recovery of specific real or specific personal property, and does not extend to actions for the recovery of money. *Kelsey v. Murray*, 28 How. 243; S. C., 18 Abb. 294; *Tallman v. Hollister*, 9 How. 508; *Judd v. Young*, 7 id. 79. See *Waring v. Waring*, 3 Abb. 246; *Conklin v. Bishop*, 3 Duer, 646; *Hornby v. Gordon*, 9 Bosw. 656; *Dayton v. Wilkes*, 5 id. 655. But in all cases where a stranger to the suit is authorized to apply to the court for leave to come in and be made a party, the allowance or denial of the order rests wholly in the discretion of the court. *Scheidt v. Sturgis*, 10 Bosw. 606.

Section 3. Application, how and when made.

a. *At what stage of the proceedings.* An application to be made a party to an action may be made at any stage of the proceedings; but, as the granting of the order is discretionary with the court, the application should be made at the earliest stage of the action possible. As a general rule, an application of this nature will be denied if delayed until after the entry of judgment. *Carswell v. Neville*, 12 How. 445. But this rule is not inflexible, and, in proper cases, the court will grant an application made even after the entry of judgment. Thus, sureties may be let in to defend, on the merits, in place of the defendant for whom they are bound, even after a regular judgment, if, on a proper application, excusing the delay, such an order appears necessary for their protection. *Jewett v. Crane*, 13 Abb. 97; 35 Barb. 208.

Section 4. Application, how made. The application of a stranger to the suit to be made a party should be made to the court at special term, on affidavits, setting forth the existence and condition of the action; the interest of the party applying in the subject-matter of the controversy; and, in cases where the application is made after judgment entered, any matter that may be set forth in excuse of the delay.

Affidavit.

(Title of cause.)

COUNTY of _____, ss:

C. D., being duly sworn, says:

I. That the above-entitled action is brought for (state cause of action).

Affidavit — Notice of motion — Order bringing in new defendant.

II. That said action has not, as the deponent is informed and believes, proceeded to judgment.

III. (State claim of the deponent in respect to the subject-matter of the action.)

IV. That the claim of the plaintiff in this action is made adversely to the rights of the deponent, and the deponent therefore desires to litigate the question directly with him.

(*Jurat.*)

(*Signature.*)

Notice of Motion.

(*Title of cause.*)

Please take notice: That on the affidavit, a copy of which is herewith served, and on the pleadings in this action, I shall apply to the court at a special term to be held at _____, on the _____ day of _____, 187____, at _____ o'clock, in the forenoon, or as soon thereafter as counsel can be heard, for an order directing C. D. to be made a party defendant in the action now pending between A. B., plaintiff, and Y. Z., defendant, and for such other and further relief as to the court may seem just.

(*Date.*)

(*Signature.*)

(*Address.*)

Order bringing in new Defendant.

(*Title of cause.*)

(*Caption.*)

On reading and filing the affidavit of C. D., and on motion of O. P., counsel for the said C. D., and after hearing Q. R., of counsel for A. B., the plaintiff in this action, in opposition (or on reading and filing the affidavit of C. D., and on proof of due service of notice of this motion, and on motion of O. P., counsel for the said C. D., no one appearing in opposition) :

ORDERED: That C. D. be made a party defendant herein, and that the summons and complaint be amended accordingly (and that the plaintiff have leave to amend them in such other respects as he may be advised); and that, on the appearance herein of the said C. D., by the service of a notice thereof on the plaintiff's attorney within _____ days from the entry of this order, a copy of the complaint as amended be served upon the attorney for the said C. D. within twenty days thereafter, and that the cause thereupon proceed in like manner as if the said C. D. had been originally made a party defendant herein.

Section 5. When the court may make the order on its own motion. It is the imperative duty of the court to order any person to be made a party, when it appears at the hearing, or at any stage of the suit, that such course is necessary to a complete determination of the controversy, even though no objection has been raised by either party. *State of New York v. Mayor, etc.,*

Court may make order on its own motion — Nature and object of interpleader.

of *New York*, 3 Duer, 119; *Davis v. Mayor of the city of New York*, 2 id. 663. So, even on appeal, the appellate court may reverse a judgment which is defective for want of parties, and order them to be brought before the court by amendment of the summons and complaint, although no objection was raised on the trial in the court below, or even on the appeal. *Shaver v. Brainard*, 29 Barb. 25.

Order by the court without motion.

(*Title of cause.*)

(*Caption.*)

This cause coming on to be tried, and it appearing to the court that the presence of C. D. is necessary to a complete determination of the controversy:

ORDERED: That the summons and complaint in this action be amended by the addition of C. D. as a defendant therein; that the plaintiff have leave to further amend said summons and complaint as he may be advised; and that he cause the said C. D. to be duly served with a copy of the same as amended within days from the date of this order; that the said C. D. have twenty days to answer the complaint after such service; and that the trial of this cause be postponed until the action is in readiness to be brought to trial against the said C. D.

ARTICLE XIV.

INTERPLEADER.

Section 1. Nature and object of the remedy.

a. In general. Interpleader, under every system of practice, whether at common law, in equity, or under the Code, is that remedy which is given to a person standing in the position of a mere stakeholder, against whom two or more persons severally make claim for the same thing, under different titles, or in separate interests; and who, not knowing to which of the claimants he ought of right to render the debt or duty claimed, or to deliver the property in his custody, is either molested by an action or actions brought against him, or fears that he may suffer injury from the conflicting claims of the parties; and who, therefore, applies to the court, not only to protect him from being compelled to pay or deliver the thing claimed to both the claimants, but also from the vexation attending upon the suits, which are, or may be, instituted against him, upon the deposit in court of the

How far action and order of interpleader are concurrent remedies.

thing claimed. *Bedell v. Hoffman*, 2 Paige, 199; *Atkinson v. Manks*, 1 Cow. 691; *Shaw v. Coster*, 8 Paige, 339; *Trigg v. Hitz*, 17 Abb. 436; *Johnston v. Lewis*, 4 Abb. N. S. 150; Code, § 122; *Hoggart v. Cutts*, 1 Craig & Ph. 197, 204.

In such cases the protection of the court ought to be extended upon principles of a most obvious equity, which require that the claimants should be compelled to interplead and settle the contest between themselves, without involving the plaintiff in a dispute in which he is not interested to any greater extent than as a mere stakeholder. *Langston v. Boylston*, 2 Ves. Jr. 109; *Pearson v. Cardon*, 4 Sim. 218; 2 R. & M. 609; *Glyn v. Duesbury*, 11 Sim. 147; *Crawshay v. Thornton*, 2 M. & C. 19.

The principle on which the jurisdiction is based was recognized at common law, and was applied where a chattel had come to a man's possession by accident or bailment, from both claimants jointly, or from those under whom both made title. The technical forms of pleading excluded the principle, except in these two cases; but in equity, where these forms did not exist, its operation was extended to all cases where the same thing, debt or obligation was the subject of both claims. *Crawshay v. Thornton*, 2 M. & C. 21; *Glyn v. Duesbury*, 11 Sim. 147.

b. How far the action and order of interpleader are concurrent remedies. The action of interpleader, as it existed under the former, and still exists under the present, practice, is a remedy concurrent with that furnished by section 122 of the Code. *McKay v. Draper*, 27 N. Y. (13 Smith) 256 (260); *Patterson v. Perry*, 14 How. 505; S. C., 6 Duer, 686; *Beck v. Stephani*, 9 How. 193. The Code has introduced no new cause of interpleader, but has simply provided a more simple remedy, which may be resorted to where previously the only remedy was by action. *Vosburgh v. Huntington*, 15 Abb. 254; *McKay v. Draper*, 27 N. Y. (13 Smith) 256. The right to the remedy by action or by order springs from substantially the same state of facts; and although the remedies are distinct, the principles applicable to the one are equally applicable to the other, and do not require to be separately discussed. The proceedings in the two cases are, however, wholly dissimilar, and are therefore separately treated.

c. Election between remedies. Any party against whom adverse claims for the same thing, debt, or duty, is sought to be enforced by action, and who makes no claim to the subject of the controversy, may, at his option, seek his remedy by action under

Interpleader — Facts essential to a right to the remedy.

the rules and practice of the former court of chancery, or he may apply for the order allowed in such cases under the provisions of section 122 of the Code. There is but one limit to this right of election between the remedies furnished by the action and the order of interpleader. The person, against whom the adverse claims are made, may resort to the action of interpleader before any action is commenced against him, by either of the adverse claimants, while the order can be obtained only after an action has been actually commenced against him to enforce one or more of the conflicting claims. *Richards v. Salter*, 6 Johns. Ch. 445; Code, § 122; *Patterson v. Perry*, 14 How. 505; S. C., 6 Duer, 686; *McKay v. Draper*, 27 N. Y. (13 Smith) 256. But where such action has been commenced, and the defendant therein is entitled to his election, if he exercises that right by commencing an action of interpleader, he cannot, at the same time, obtain the relief provided by an order under section 122 of the Code. *Washington Life Ins. Co. v. Lawrence*, 28 How. 435.

The statute does not abrogate the right to relief by an action of interpleader; but, if an action is commenced for that purpose, the remedy by order will not also be granted. *Sturgess v. Claude*, 1 Dowl. 505; *Arrayne v. Lloyd*, 1 Bing. (N. C.) 720; 1 Sc. 609.

Section 2. Facts essential to a right to the remedy.

a. In general. As has been previously stated, the facts which will entitle a person to maintain an action of interpleader will also entitle him to the order, under the Code, if the claims against him are sought to be enforced by action. The principles governing the right to relief, under either form of the remedy, are identical, and the principles laid down in this section are applicable to the remedy by action or by order.

It is a general rule that bills of interpleader will not be encouraged while there are other means of adjusting conflicting claims with safety to the stakeholder. But a party holding a fund in which he has no interest, and to which adverse claims are set up, will not be compelled to stand an action at law brought by either party, even under a promise of indemnity from the other. Neither will he be obliged to exercise any judgment on the subject of the conflicting rights of the parties, when one threatens or commences a suit, and the other forbids payment. *Bleeker v. Graham*, 2 Edw. Ch. 647; *Langston v. Boylston*, 2 Ves. Jr. 101 (109); *Atkinson v. Manks*, 1 Cow. 691. But, on the other

Interpleader — Party seeking relief must be disinterested.

hand, he will be entitled to some form of the remedy of interpleader, if the facts of the case are otherwise in harmony with the following principles :

b. Party seeking relief must be disinterested. The right to the relief furnished by the remedy of interpleader is, in all cases, founded upon the fact that two or more persons are making a claim against a third person for the same thing, and that the party against whom these claims are urged claims no beneficial interest in the property or thing in dispute, but merely asks to be allowed to deposit the same in court, and that the persons who have commenced, or are threatening him with suits, in respect thereto, may be compelled, by order or decree of the court, to settle their claims among themselves, and not with him, or at his expense or hazard. *Atkinson v. Manks*, 1 Cow. 691 ; *Langston v. Boylston*, 2 Ves. Jr. 101, 109.

The first and most essential fact to be established, to show the right of the party seeking relief to the remedy furnished by interpleader, is that such party claims no interest in or to the property or thing in dispute. No relief of this nature can be granted where it appears that the party seeking the remedy claims an interest in, or a portion of, the fund in dispute. *Wakeman v. Dickey*, 19 Abb. 24 ; *Atkinson v. Manks*, 1 Cow. 691 ; *Oppenheim v. Leo Wolf*, 3 Sandf. Ch. 571 ; S. C., 4 N. Y. Leg. Obs. 259. Neither can this relief be obtained, where the party against whom conflicting claims are made, asks any relief against either of the claimants, beyond permission to pay the money or deliver the property to the one to whom it of right belongs, and to be thereafter protected against the claims of both. *Bedell v. Hoffman*, 2 Paige, 199 ; *New York & New Haven R. R. Co. v. Schuyler*, 1 Abb. 417 ; *Schuyler v. Hargous*, 3 Rob. 673 ; S. C., 28 How. 245 ; *Mitchell v. Hayne*, 2 Sim. & Stu. 63 ; *Atkinson v. Manks*, 1 Cow. 691. So a denial of any liability to either of the claimants, and a neglect to bring the property or thing in dispute into court, will be fatal to any application for this remedy. *McHenry v. Hazard*, 45 Barb. 657. In all cases the party seeking relief by interpleader must be wholly disinterested, and have no interests conflicting with, or adverse or hostile to, those of either of the claimants. *New York & New Haven R. R. Co. v. Schuyler*, 1 Abb. 417 ; *Lincoln v. Rutland & Burlington R. R. Co.*, 24 Vt. 639. Thus, while an auctioneer may compel a vendor, who claims the deposit money received at a sale of his property,

Interpleader — Must have no adequate remedy at law.

to interplead with the vendee who claims its return, he cannot obtain this remedy while he himself claims to deduct his commissions from the deposit in question. *Bleeker v. Graham*, 2 Edw. Ch. 647; *Mitchell v. Hayne*, 2 Sim. & Stu. 63; *Moore v. Usher*, 7 Sim. 384; *Bignold v. Audland*, 11 id. 24. So, if any party seeking this relief has in any way lent himself to further the claims of either party to the fund in controversy, or to aid one in obtaining the possession thereof, to the exclusion of the other, he will have such an interest in relation to the subject-matter of the dispute as will justify a denial of the relief sought. *Marvin v. Ellwood*, 11 Paige, 365. The right to the remedy of interpleader always depends upon the fact that the party claiming the right is the mere holder of a stake which is equally contested by other parties, and as to which the plaintiff stands wholly indifferent between them; and that, when the respective rights of the claimants are settled, nothing further remains in controversy. *Lincoln v. Rutland & Burlington R. R. Co.*, 24 Vt. 639.

In order to prevent the proceeding by interpleader from being resorted to for the purpose of giving an advantage to one of the claimants over the other, the court will require the party seeking the relief to accompany his complaint or application with an affidavit that there is no collusion between him and any of the parties, and to bring the money or thing claimed into court, so that he cannot be benefited by the delay of payment which may result from the proceeding. *Atkinson v. Manks*, 1 Cow. 691; *Farley v. Blood*, 30 N. H. (10 Foster) 354; Code, § 122.

The statute does not apply where the subject-matter of the claim has arisen out of some illegal transaction, and therefore an order of interpleader will not be granted in an action brought against the holder of a stake deposited with him to abide the event of an illegal race. *Applegarth v. Colley*, 2 D. N. S. 223.

c. Must have no adequate remedy at law. It is essential to the right to the remedy of interpleader that the party asserting that right has no protection at law against the consequences of the conflicting claims, or that the legal remedy, if any exists, is inadequate to afford complete protection against them. *Dry Dock Methodist Episcopal Mission Church v. Carr*, 2 Barb. 60; *Bedell v. Hoffman*, 2 Paige, 199; *Mohawk and Hudson R. R. Co. v. Clute*, 4 id. 384.

Interpleader—Must be ignorant of the rights of the claimants.

d. Must be ignorant of the rights of the claimants. It is also essential to the right of interpleader, that the person standing in the position of a stakeholder is ignorant of the rights of the different claimants to the fund held by him, or, at least, that there is some doubt as to which of them is entitled to the fund, so that he cannot safely pay it to either. *Mohawk and Hudson R. R. Co. v. Clute*, 4 Paige, 384; *Wilson v. Duncan*, 11 Abb. 3; *Bell v. Hunt*, 3 Barb. Ch. 391; *Shaw v. Coster*, 8 Paige, 339. If it appears that the party seeking to compel adverse claimants to interplead is fully acquainted with the rights of the respective parties, or, if it is shown by him in his complaint or affidavit that one of the claimants has no right to the fund or property in controversy, the court will leave the parties to adjust their claims at law. *Ib.*

In certain cases, a party seeking to compel others to interplead will be estopped from alleging his ignorance of the rights of all the claimants, and in these cases the remedy will be denied. Thus, a *bona fide* purchaser of merchandise will not be allowed to indirectly deny the title of his vendor, by seeking to compel such vendor, when demanding payment or return of the goods, to interplead with a stranger who makes a similar demand, on the ground that the goods were originally obtained from him through fraud. *Trigg v. Hiltz*, 17 Abb. 436; *Johnston v. Lewis*, 4 Abb. N. S. 150. Upon the same principle a tenant will not be permitted to deny the title of his landlord, nor can he interplead him with a stranger. *Seaman v. Wright*, 12 Abb. 304. And it is a well-settled principle that a bailee cannot deny the title of his bailor, nor can a vendee deny the title of his vendor. *Marrin v. Ellwood*, 11 Paige, 365; *Shaw v. Coster*, 8 id. 339; *Lund v. Seaman's Bank for Savings*, 37 Barb. 129; 23 How. 258. But a vendee will not be estopped from alleging ignorance of the title of his vendor where two parties claim to have sold the goods for which a demand for the payment is made against him by each. *Johnston v. Lewis*, 4 Abb. N. S. 150.

It is also a general rule that if the party seeking relief has acknowledged a title in one of the claimants, and has thus incurred a separate liability to him, the remedy by interpleader will be denied. *Crawshaw v. Thornton*, 2 Mylne & Craig, 1.

e. Claims of parties must be identical. It is an invariable rule that the thing to which the parties make adverse claims, whether it be a debt, a duty, or specific property, must be one

Interpleader — Claims of parties must be identical.

and the same thing ; or, in other words, the claims must be identical. Thus, where an auctioneer, by direction of the owner, sells the same property to two persons successively and receives a deposit from each, he cannot, on a claim made by the owner of the property for the amount of both deposits, and a counter-claim by each for the amount of his individual deposit, compel the owner and the purchasers to interplead. Although, as between the vendees there is one question in common, viz. : who is the real purchaser of the estate, yet as against the auctioneer, their claims are for different things, viz. : the individual deposit of each. But the auctioneer may compel the owner of the property and the first purchaser to interplead, or the owner and the second purchaser ; as, between these parties, the claims are identical. *Hoggart v. Cutts*, 1 Craig & Phill. 197.

Claims for different amounts can never be identical. But the fact that claims are for the same amount will not, of itself, be sufficient to render them identical, as the amount may be the same and yet the debts be different. The fact that the claims are the same in amount will, however, go far to determine the question of identity. *Glyn v. Duesbury*, 11 Sim. 139. But the circumstances out of which the adverse claims arise should also be considered in determining their identity. Thus, a vendee who is sued by his vendor for the price of goods purchased, and by a third party for the value of the goods in trover, cannot maintain an action of interpleader, as the claims made against him are not identical. The one seeks to have the benefit of a contract, the other claims the value of a chattel, which is the subject-matter of it. *Slaney v. Sidney*, 14 Mees. and Wels. 800 ; S. C., 15 Law J. Exch. 72. See *Trigg v. Hitz*, 17 Abb. 436 ; *Johnston v. Lewis*, 4 Abb. N. S. 150. But where claims are for different amounts, yet are identical in other respects, the action may be maintained. Thus, where a party has been assessed in two different counties for the same personal property, he may maintain an action of interpleader against two collectors seeking to collect the tax levied under such assessment, although the amounts in each case may be different, as the claims are for the same debt or duty. *Thomson v. Ebbets*, 1 Hopk. 272 ; *Redfield v. Supervisors of Genesee Co.*, 1 Clarke's Ch. 42 ; *Mayor, etc., of New York v. Flagg*, 6 Abb. 296 ; *Mohawk and Hudson R. R. Co v. Clute*, 4 Paige, 384.

Interpleader — Character of the property claimed.

So although the original debts may have been identical in amount, yet, where the plaintiff claims part payment as to one of the parties making a demand against him, an action of interpleader cannot be maintained. *Diplock v. Hammond*, 27 Eng. Law and Eq. 202. And it is an invariable rule that where the plaintiff raises any question as to the amount of the claim, which is the subject of litigation, this alone will be fatal to the right to the remedy. *Ib.*

These rules do not, however, require that the claims shall be identical in character, as that they shall be both legal, or both equitable, in order to entitle the party against whom the claims are made to compel the claimants to interplead. If the claims are in fact identical, it is a matter of no importance, so far as relates to the right to the remedy that one is legal and the other equitable, or that they are both legal or both equitable. *Richards v. Salter*, 6 Johns. Ch. 445; *Yates v. Tisdale*, 3 Edw. Ch. 71; *Angell v. Hadden*, 15 Ves. 244; *Morgan v. Marsack*, 2 Mer. 107; *Lowndes v. Cornford*, 18 Ves. 299.

The claims must not only relate to the same debt, duty or thing, but must, also, be in reality conflicting claims. *Cochrane v. O'Brien*, 2 J. & L. 380; S. C., 8 Ir. Eq. R. 241; *Mohawk & Hudson R. R. Co. v. Clute*, 4 Paige, 384, 392. A mere pretext of a conflicting claim, or the mere possibility that there may be two liabilities, is not sufficient to maintain an action of interpleader. *Ib.*

f. Character of the property claimed. In order to maintain the action or to obtain the order of interpleader, there must be either some specific property, or some definite sum of money to which different parties make claim. It is essential to the right to the remedy that the property or thing claimed is definite and certain in its character. *Lincoln v. Rutland & Burlington R. R. Co.*, 24 Vt. 639. But the rule goes no farther. Where the property in dispute is fixed and definite in its character, as shares in the capital stock of a bank, the precise value of the property is immaterial. *Cady v. Potter*, 55 Barb. 463.

g. Claims, how urged. In order to entitle a party to an order of interpleader under the Code, it is necessary that it shall appear that an action has been commenced against him to enforce a specified claim, and that a person not a party to the action makes a demand against him for the same debt or property. Code, § 122; *Patterson v. Perry*, 14 How. 505; S. C., 6 Duer, 686; *McKay v. Draper*, 27 N. Y. (13 Smith) 256.

Interpleader—Applicant must be in possession of matter in dispute.

To entitle a party to relief under the statute it is not only necessary that he be sued, but the complaint in the action must have been served. Code, § 122; *Parker v. Linnett*, 2 D. P. C. 562; *Harrison v. Payne*, 2 Hodges, 107. And the application must be made before the service of the answer in the action. Code, § 122.

A married woman may have the order when the claim relates to her rights as against an execution creditor. *Shingler v. Holt*, 7 H. & N. 65.

To entitle a party to maintain the action of interpleader, however, it is not essential that an action should have been actually commenced. It is sufficient that a claim is made against him, and that he is in danger of being molested by conflicting rights. *Yates v. Tisdale*, 3 Edw. Ch. 71; *Schuyler v. Hargous*, 28 How. 245; S. C., 3 Rob. 673; *Angell v. Hadden*, 15 Ves. 244; *Langston v. Boylston*, 2 Ves. Jr. 101; *Dungey v. Angove*, id. 304, 310. Even a liability to be called upon, by different persons, for the same demand, gives a right to maintain the action to determine which of the parties is entitled to the fund or property which may be the subject of such demand. *Duke of Bolton v. Williams*, 2 Ves. Jr. 138, 152; *East India Co. v. Edwards*, 18 Ves. 376.

Where actions were commenced against an acceptor of a bill by two parties, each of whom claimed to be the lawful owner of it, the case was held to be a proper one for an interpleader to determine which one of them was lawfully entitled to recover on the bill. *Regan v. Serle*, 9 Dowl. 193.

So, where the assignee of a bankrupt factor, sued for goods sold by the bankrupt to the defendant, and a third party claimed the proceeds as having been the consignor of the goods, the defendant was allowed an order of interpleader. *Johnson v. Shaw*, 4 Man. & Gr. 916; 12 L. J. N. S. C. P. 112.

h. Applicant for relief must be in possession of the matter in dispute. It is also essential to the right to relief by action, or by an order of interpleader, that the party seeking relief should be in possession of the matter in dispute, and thus be able to obey any order of the court in relation to the disposition thereof. And it is not enough that similar property, or the same sum, may be in the possession of said party, which he is willing to deposit or pay subject to the direction of the court, if the identical thing in controversy has been delivered to either of the

Diligence — Action of interpleader.

claimants. *Inland v. Bushell*, 5 Dowl. 147; *Allen v. Gilby*, 3 id. 143. So where an action is brought to recover the possession of personal property, and the plaintiff therein has obtained possession thereof by proceedings in the nature of replevin, the defendant cannot compel the plaintiff to interplead with a stranger claiming the same property, if he has waived his right to a redelivery of the property, and consequently cannot deposit it in court. *Vosburgh v. Huntington*, 15 Abb. 254.

i. Diligence. A party who seeks relief by interpleader must use due diligence in making the application, for delay may deprive him of the remedy sought. *Larabrie v. Brown*, 1 D. & J. 205; *Devereux v. John*, 1 D. P. C. 548; *Cook v. Allen*, 2 id. 11; 1 C. & M. 542; 3 Tyr. 586; *Dixon v. Ensell*, 2 D. P. C. 621; *Brockenbury v. Laurie*, 3 id. 180.

Section 3. Action of interpleader.

a. Old rules still in force. The Code, as has previously been stated, has left unchanged the rules and principles governing the right to maintain the action of interpleader. *Vosburgh v. Huntington*, 15 Abb. 254; *Sherman v. Partridge*, 1 id. 256; S. C., 11 How. 154; 4 Duer, 646. It follows from this, that where this action was maintainable under the former practice, it is maintainable now; and that the cases in which the action will lie are limited to the cases in which the bill of interpleader might properly have been filed in chancery. So, whenever a party elects to bring an action of interpleader, instead of applying for an order under section 122 of the Code, the action must be governed by the practice and rules which obtained in chancery in similar cases. *Washington Life Insurance Co. v. Lawrence*, 28 How. 435.

b. Complaint and affidavit. In order to maintain an action of interpleader, the complaint must show (1), that two or more persons have preferred a claim against the plaintiff; (2) that they claim the same thing; (3) that the complainant has no beneficial interest in the thing claimed; and (4) that he cannot determine, without hazard to himself, to which of the two defendants the thing of right belongs. *Atkinson v. Manks*, 1 Cow. 691; *New York & N. H. R. R. Co. v. Schuyler*, 1 Abb. 417; *Mohawk & Hudson R. R. Co. v. Clute*, 4 Paige, 384; *Redfield v. Supervisors of Genesee*, 1 Clarke, 42. It must also show that the complainant can in no other way be protected from an oppressive or vexatious litigation in which he has no personal interest. *Beck v. Stephani*, 9 How.

193; *Dry Dock Methodist Episcopal Mission Church v. Carr*, 2 Barb. 60; *Bedell v. Hoffman*, 2 Paige, 199. The complaint should contain no demand for relief against either of the defendants, further than that the plaintiff in the action of interpleader be allowed to pay the money or deliver the property to the one to whom it, of right, belongs, and that he be thereafter protected from the claims of both. *Ib.* *Mitchell v. Hayne*, 2 Sim. & Stu. 63; *Schuyler v. Hargous*, 3 Rob. 673; S. C., 28 How. 245; *Atkinson v. Manks*, 1 Cow. 691.

The court will also require the plaintiff to accompany his complaint with an affidavit that there is no collusion between him and any of the parties, and will also require him to bring the money or thing claimed into court. *Farley v. Blood*, 30 N. H. (10 Foster) 354; *Shaw v. Coster*, 8 Paige, 339; *Bignold v. Audland*, 11 Sim. 23. No order of injunction will issue until the money or property has been so deposited. *Shaw v. Chester*, 2 Edw. Ch. 405; *Mohawk & Hudson R. R. Co. v. Clute*, 4 Paige, 384.

c. Injunction. Whenever it appears that a proper case for an action of interpleader has been presented in the complaint, the court will, almost as of course, issue an injunction restraining the claimants from further proceedings to enforce their respective claims until further order. *Crawford v. Fisher*, 10 Sim. 479; *Moore v. Usher*, 7 id. 383. This injunction may be obtained on an *ex parte* application, unsupported by affidavits, if the complaint is duly verified. *Walbranke v. Sparks*, 1 Sim. 385. See *Jew v. Wood*, 1 Craig & Ph. 185. On the hearing of the cause, if the party establishes his right to a decree of interpleader, the court will make this preliminary injunction perpetual. See *Richards v. Salter*, 6 Johns. Ch. 445.

d. Answer or demurrer. The defendants in the action of interpleader have twenty days from the service of the summons and complaint in which to answer or demur as in other actions. *Washington Life Ins. Co. v. Lawrence*, 28 How. 435.

e. Decree. The issues raised by a demurrer or an answer will be disposed of in the ordinary manner of disposing of issues; and, if the plaintiff is successful, he can obtain his relief by the decree made thereon. *Washington Life Insurance Co. v. Lawrence*, 28 How. 435.

f. On default. An order granting the relief sought may be taken by default, but not until after all of the defendants have failed either to demur or answer, within the time allowed by the

Interpleader — Order under the Code.

Code for the service of an answer or demurrer. *Washington Life Insurance Co. v. Lawrence*, 28 How. 435.

g. Costs. Where an action of interpleader has been properly commenced, it necessarily follows that the complainant is entitled to his costs out of the fund in court. *Atkinson v. Manks*, 1 Cow. 691. And, as between the defendants, costs will be awarded to the one who succeeds in substantiating his claim to the fund or thing in dispute. *Covtan v. Williams*, 9 Ves. Jr. 107; *Aldridge v. Mesner*, 6 id. 418.

Section 4. Order under the Code.

a. Application, when made. As the remedy given by the Code, in the form of an order of interpleader, can only be obtained by a defendant against whom an action is pending, upon a contract or for specific real or personal property, and against whom a person not a party to the action makes a demand for the same debt or property, it follows that no application for the order can be made by such defendant until he has been served with the complaint in such action, because, until the complaint is served, he must necessarily be ignorant of the fact that the adverse claims made against him are identical. It is also required that the application should be made before answer. Code, § 122.

The affidavit which is used to obtain an interpleader, order ought to show that the application is made before the service of an answer; but this objection may be waived, or the affidavit amended. *Frost v. Heywood*, 2 D. N. S. 801; 7 Jur. 179; 21 L. J. Exch. 242.

b. Who may apply. The application for the order can be made only by a defendant against whom an action is pending upon a contract, or for specific real or personal property. In no other case is an application authorized by the Code. Code, § 122.

c. Notice. The defendant is required by the Code to give notice of the application to the plaintiff, who has commenced the action against him, and also to all other persons not parties to the action, who make a demand against him for the property in litigation. Code, § 122. Unless a shorter time is fixed by an order to show cause, the notice of the application must be served at least eight days before the time appointed for the hearing. Code, § 402.

Affidavits—Notice of motion for an order of interpleader.

d. Affidavits. The application must be made upon an affidavit of the defendant, showing:

1. That an action upon contract, or for specific real or personal property, is pending against him in which issue has not been joined.
2. That a person not a party to the action has made a demand against him for the same debt, duty, or property.
3. That he is not in collusion with said person.
4. That he is indifferent to the claims of either party; and,
5. That he has no interest in, and has made no claims upon, the property in controversy, but is ready and willing to deposit the same in court to abide the event of the action. Code, § 122; *Dreyer v. Rauch*, 10 Abb. N. S. 343.

Notice of motion for an order of Interpleader.

(Title of cause.)

Please take notice: That upon the affidavit of James Smith, a copy of which is herewith served upon you, and upon the complaint herein, the defendant will apply to this court, at a special term, to be held at _____, in the _____ of _____, on the _____ day of _____, 187____, at _____ o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order to substitute O. P. of _____ in his place, as defendant in this action, and to discharge this defendant from liability to either the plaintiff herein or the said O. P. concerning (state subject of the adverse claims), mentioned in the complaint, upon this defendant's paying into court the sum of _____ dollars, the amount claimed in the summons herein (or upon the defendant's transferring the property mentioned in the complaint to such person as the court may direct), or for such other and further relief as to the court may seem just.

(Date.)

MARTIN McMARTIN,

Defendant's Attorney.

To R. H. ROSA,

Plaintiff's Attorney.

To O. P.

It is not strictly necessary that the defendant should allege that he is ignorant of the rights of the respective claimants, and does not know to which he may pay the money or deliver the property in his hands. *Dreyer v. Rauch*, 10 Abb. N. S. 343. But such an allegation will be proper, and its insertion in the affidavit will be in conformity with the more strict and, perhaps, safer rule of

 Affidavit to obtain order of interpleader.

practice. See *Wilson v. Duncan*, 11 Abb. 3; *Shaw v. Coster*, 8 Paige, 339.

Where the party seeking the order is an officer of a corporation or association, the affidavit should state that the company or corporation, and not the person making the affidavit, did not collude with the party making the demand. This allegation should not be made positively, but to the best of the knowledge and belief of the person making the affidavit. *Bigbold v. Audland*, 11 Sim. 23.

e. The order. On the receipt of such affidavit the court may, in its discretion, grant an order substituting the stranger to the suit in the place of the defendant against whom he makes his demand. The order will also discharge the defendant from liability to either party, upon his depositing, in court the amount of the debt, or delivering the property, or its value, to such person as the court may direct. Code, § 122.

Affidavit to obtain order.

(*Title of cause.*)

COUNTY OF _____, ss:

James Smith, of _____, being duly sworn, says:

I. That he is the defendant in the above-entitled action.

II. That the complaint herein was served upon him on the day of _____, 187____, and that no answer to the same has as yet been served or filed.

III. That the action is brought to recover (state cause of action, specifying the precise thing claimed).

IV. That the same debt (or property) is claimed by one O. P., of _____ (state how such claim is made).

V. That the defendant is ignorant of the rights of the respective claimants, and is not acting in collusion with either of them.

VI. That the defendant is indifferent to the claims of either party, and has no interest in, or claim upon, the moneys (or property) held by him, but that he is ready and willing to pay such moneys into court, to abide the event of the action (or to deliver the property to such person as the court may direct), upon being discharged from liability to either claimant.

(*Jurat.*)

JAMES SMITH.

If the defendant is not in a position to comply with these conditions no order can issue. *Vosburgh v. Huntington*, 15 Abb. 254.

Appeal — Order of interpleader.

The court may further order that, if the person thus substituted in the place of the defendant shall not, within twenty days after service of a copy of the order and of the complaint, appear and defend the action, the deposit shall be paid over to the plaintiff. *Van Buskirk v. Roy*, 8 How. 425; *Fletcher v. Troy Savings Bank*, 14 id. 383.

f. Appeal. An appeal may be taken from the allowance of the order. *Wilson v. Duncan*, 11 Abb. 3.

*Order of Interpleader.**(Title of cause.)**(Caption.)*

On reading and filing the affidavit of James Smith, and on motion of Martin McMartin, of counsel for the defendant, and after hearing R. H. Rosa, of counsel for the plaintiff, and W. H. Smith, of counsel for O. P.

ORDERED: That on the payment by the defendant to the clerk of the county of _____, of the amount claimed in the summons herein, principal and interest, less ten dollars costs of this motion, within five days from the entry of this order, O. P. be substituted as defendant in this action, in place of James Smith, the defendant above named, and that the said James Smith thereupon be discharged from liability to either the plaintiff above named or said O. P.

And it is further ordered, that if the said O. P. does not appear and defend this action within twenty days after service upon him of a copy of this order, together with a copy of the complaint herein, the plaintiff may apply *ex parte* for an order that the money so deposited be paid over to him.

Or, where the subject of the controversy is to obtain the delivery of specific personal property, the directory part of the order may be in the following form:

ORDERED: That the defendant deliver the property mentioned in the complaint herein to (Robert Lansing, Esq.), of _____, who is hereby appointed receiver thereof; and that the said Robert Lansing hold the said property subject to the further order of this court.

That O. P. of _____, be substituted as defendant in this action in the place of the above-named James Smith, who shall, upon delivery of the said property to the said receiver, be discharged from all liability therefor, either to the plaintiff or to the said O. P.

That within _____ days after entry of this order, the plaintiff serve a summons and a copy of his complaint, amended as he may be advised, with a copy of this order, upon the said O. P., and that the said O. P. answer such complaint within twenty days thereafter.

Order of interpleader.

And it is further ordered, that, if the plaintiff neglect to serve his summons and complaint and this order, as herein directed, the defendant James Smith may apply to the court for an order dismissing the action, and that the said property be delivered by the receiver to the said defendant James Smith, and that, if the said O. P. neglect to answer such complaint, if served as herein directed, the plaintiff may apply, on notice, for an order that said property be delivered by the said receiver to the plaintiff.

That dollars costs be allowed to the said James Smith, to be paid by the plaintiff, and to be allowed to him in case of his final recovery of judgment.

CHAPTER X.

IN WHAT PLACE OR COURT TO SUE.

ARTICLE I.

IN WHAT COURTS OR PLACE A PLAINTIFF MUST SUE.

Section 1. What actions must be tried where the subject of the action is situated.

a. Actions for recovery of real property, or for the determination of a right or interest therein. Under the old practice at law, previous to the adoption of the Code, the selection of a court, in which to sue, or the choice of the place of trial, was usually determined, either by the amount of the debt or damages claimed by the plaintiff, or by the nature of the action, as being either local or transitory in its essential features. 1 Burr Pr. 75. These circumstances, however, have no longer a controlling influence, and the whole matter of venue and choice of the place of trial has been made the subject of special statutory provisions contained in several distinct sections of the Code. In some cases the plaintiff has no choice, and if he sue at all he must bring his action in that court or place specifically designated in such cases. The 123d section of the Code provides that certain specified actions must be tried in the county in which the subject of the action, or some part thereof, is situated, and among these are enumerated: 1. Actions for the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest. The application of this section of the Code, to actions at law, is unquestioned. But there has not been entire uniformity in the decisions in relation to its effect upon equitable actions, although it is now conclusively settled that such actions are as much within the statute as actions at law. An equitable action, brought to have the title to land declared to be in the plaintiffs, on the ground that the deed conveying the title to the defendant is a mortgage, and asking for a conveyance thereof to the plaintiffs, and for an accounting by the defendant, is an action for the recovery and determination of an interest in real estate, and it

Actions for injuries to real property — Actions for partition, etc.

must be tried in the county where the property is situated. *Bush v. Treadwell*, 11 Abb. N. S. 27.

So of an action of an equitable nature, which seeks to enjoin the defendant from erecting a bridge across a public street, to the apprehended injury of the plaintiff's premises. *Leland v. Hathorn*, 42 N. Y. (3 Hand) 547; 9 Abb. N. S. 97.

An equitable action brought to obtain a judgment that a conveyance of land by the defendant is fraudulent, and that the land is to be declared to be held in trust for the plaintiff, is within this section. *Wood v. Hollister*, 3 Abb. 14; *Starks v. Bates*, 12 How. 465. So of an action which asks that it may be adjudged that specified lands are subordinate to the rights of the plaintiff. *Mairs v. Remsen*, 3 Code R. 138; *Hubbell v. Sibley*, 4 Abb. N. S. 403, and *Rawls v. Carr*, 17 Abb. 96, must be regarded as of no authority, in view of the decisions just cited.

This section of the Code has no application to those cases in which the land is not situated within this State; and yet the supreme court may compel a resident of this State to perform his contract specifically, where he has agreed to convey lands situated in another State. *Newton v. Bronson*, 13 N. Y. (3 Kern.) 587. See, also, *Mussina v. Belden*, 6 Abb. 165; *Latourrette v. Clarke*, 45 Barb. 327; S. C., reported directly contrary, 30 How. 247; *ante*, 17.

b. Actions for injuries to real property. All actions for injuries to real property, whether the remedy sought be legal or equitable, must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, in proper cases. Code, § 123.

c. Actions for partition. Actions for the partition of real property are among those required to be brought in the county in which the land is situated. Code, § 123, sub. 2.

d. Actions for foreclosure. "Actions for the foreclosure of a mortgage of real property" must be tried in the county where the mortgaged premises are situated; and this is so, although the money may be loaned and the mortgage executed and delivered to the mortgagee in another county. Code, § 123; *Miller v. Hull*, 3 How. 325; S. C., 1 Code R. 113; *Vallejo v. Randall*, 5 Cal. 461. If, however, the place of trial was in a county other than that in which the mortgaged premises are situated, and no motion or demand had been made to change the place first

Distraigned property — Actions for a penalty or forfeiture, etc.

selected, the proceedings in the foreclosure suit cannot afterward be objected to on the ground of irregularity. *Marsh v. Lowry*, 26 Barb. 197; S. C., 16 How. 41. In actions affecting the title to lands, under section 123, the defendant may demand that they shall be tried in the proper county, as a matter of right. *Starks v. Bates*, 12 How. 465; *Bush v. Treadwell*, 11 Abb. N. S. 27. See *Leland v. Hathorn*, 9 id. 97; S. C., 42 N. Y. (3 Hand) 547.

e. Distraigned property. If personal property be distraigned for any cause, any action brought for its recovery must be tried in the county where it was distraigned. Code, § 123, sub. 4.

Section 2. What actions must be tried where the cause of action arose.

a. Actions for a penalty or forfeiture. The 124th section of the Code provides, that other actions "must be tried in the county where the cause of action, or some part thereof, arose," and among these "are actions for the recovery of a penalty or forfeiture imposed by statute; except, that, when it is imposed for an offense committed on a lake, river or other stream of water situated in two or more counties, the action may be brought in any county bordering on such lake, river or stream, and opposite to the place where the offense was committed." Code, § 124.

b. Actions against public officers. "Actions against a public officer, or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command or in his aid, shall do any thing touching the duties of such officer, must be tried in the county where the cause, or some part thereof, arose." Code, § 124, sub. 2.

An officer, acting beyond the scope of his authority, is not within the protection of this provision of the Code; but where, in performing an act within the scope of his authority, he commits an error, or even abuses the confidence which the law reposes in him, he is still entitled to its benefits. (*Brown v. Smith*, 24 Barb. 419); and he is entitled to this protection, although the suit is brought by the people, and prosecuted by the attorney-general of the State. *People v. Hayes*, 7 How. 248.

Where a public officer is sued for an official act, he may waive the statutory provision of the above section in his favor, and he will be regarded as concluded by this waiver. *Howland v. Willetts*, 5 Sandf. 219; S. C. affirmed, 9 N. Y. (5 Seld.) 171.

What actions must be tried where the parties reside.

Section 3. What actions must be tried where the parties reside.

a. It is further provided by the Code, that "in all other cases the action shall be tried in the county in which the parties, or any of them, shall reside at the commencement of the action." Code, § 125, sub 1.

The term *parties*, in this section, has been construed to mean parties in interest, and not the nominal parties, or parties to the record. *Hart v. Oatman*, 1 Barb. 229; *Henry v. Bank of Salina*, 5 Hill, 523. See *Taber v. Gardner*, 6 Abb. N. S. 147, 149. Unless otherwise expressly provided, the people may sue in any county, on the ground that they are a party whose *residence* extends to every county. *People v. Cook*, 6 How. 448.

The residence of a corporation, for the purposes of this section of the Code, is where its principal office is located, and its general business transacted. *Hubbard v. National Protection Ins. Co.*, 11 How. 149; *Conroe v. National Protection Ins. Co.*, 10 id. 403. See *Pond v. Hudson River Railroad Co.*, 17 id. 543. A railroad company is a resident of every county through which the road passes, and a suit may be brought against it in any such county, where process can be served on the proper officer. *Sherwood v. Saratoga and Washington Railroad Co.*, 15 Barb. 650; *Belden v. New York and Harlem Railroad Co.*, 15 How. 17.

In an action for a divorce on the ground of cruel and inhuman treatment, the wife may bring the action in the county where she actually resides when it is commenced, although the defendant (her husband) resides in another county. The common-law maxim that the domicile of the wife follows that of the husband — having no application in such a case. *Vence v. Vence*, 15 How. 497; S. C. affirmed, 15 id. 576 (n.)

In a transitory action, the place of trial should be in the county where the principal transactions between the parties occurred, and the largest number of material witnesses reside. *Jordan v. Garrison*, 6 How. 6; S. C., 1 Code R. N. S. 400.

Actions to recover damages for injuries to the person, except so far as they have been regulated by statute (2 R. S. 409) are to be regarded as transitory, and triable in any county which the plaintiff may select. *McIvor v. McCabe*, 16 Abb. 319; S. C., 26 How. 257.

A foreign corporation, having an agency and business office in one of the counties of this State, is not a resident of such

county within the provisions of section 125. *The International Life Assurance Co. v. Sweetland*, 14 Abb. 240.

b. *Non-residents*. If none of the parties to an action are residents of the State, such action may be tried in any county which the plaintiff may designate in his complaint, subject, however (as in all the cases before mentioned in this chapter), to the power of the court to change the place of trial in the cases provided by statute. Code, § 125, sub. 2.

ARTICLE II.

IN WHAT COURTS OR PLACE A PLAINTIFF CANNOT SUE.

Section 1. Jurisdictional limitations as to courts.

a. *Jurisdiction as to subject-matter*. A plaintiff, in some cases, cannot sue in certain courts, because such courts have no jurisdiction over the subject-matter of his action, or over the parties to it, or on account of some other jurisdictional limitation imposed by law. Thus, it has been decided that the courts of this State have no jurisdiction over the subject-matter of patent rights, and that a suit brought in a State court, to restrain the infringement of such right, would not be entertained. *Dudley v. Mayhew*, 3 N. Y. (3 Comst.) 9; *Gibson v. Woodworth*, 8 Paige, 132. Nor an action for damages for such infringement. *Burrall v. Jewett*, 2 Paige, 134. The State courts have no jurisdiction in an action arising under the patent laws. So decided, in a suit brought in which it was necessary for the plaintiff, in order to make out his cause of action, to show the existence and validity of a patent for an invention, and the complaint was dismissed for want of jurisdiction. *Tomlinson v. Battel*, 4 Abb. 266.

In every case it is the law that confers jurisdiction, and a court can exercise it, only to the extent of the authority thus conferred. Even the consent of parties is insufficient to confer jurisdiction over the subject-matter of an action. *Coffin v. Tracy*, 3 Caines, 129; *Oakley v. Aspinwall*, 3 N. Y. (3 Comst.) 547; and the judgment of a court, acting without proper jurisdiction, will be utterly void and unavailable for any purpose. *Borden v. Fitch*, 15 Johns. 121; *Noyes v. Butler*, 6 Barb. 613; *Dudley v. Mayhew*, 3 N. Y. (3 Comst.) 9; *Beach v. Nixon*, 9 N. Y. (5 Seld.) 36.

Jurisdiction as to parties and amount — What objection cannot be waived.

b. Jurisdiction as to parties. A court may, however, possess the requisite jurisdiction over the subject-matter and yet the plaintiff be debarred from bringing suit, because of a want of jurisdiction as to parties. Thus, no State court can exercise jurisdiction in a suit brought against a foreign consul. *Valarino v. Thompson*, 7 N. Y. (3 Seld.) 576; *Rock River Bank v. Hoffman*, 14 Abb. 72; S. C., 22 How. 510; *Taaks v. Schmidt*, 19 id. 413; *Republic of Mexico v. Arrangois*, 11 id. 1; affirmed, id. 576. And consuls are likewise exempt from service of attachment as against non-resident debtors. *Matter of Ay-cinena*, 1 Sandf. 690.

Our courts have no jurisdiction over foreign powers; and being without the requisite jurisdiction over the parties, they can assert no authority over the property of such parties, even such as is within our own territorial limits. *Leavitt v. Dabney*, 7 Rob. 350; S. C., 3 Abb. N. S. 469; 37 How. 264. And the courts of this State have no power to effect the removal or appointment of trustees, directors, etc., of foreign corporations. *Fisk v. Chicago, Rock Island and Pacific Railroad Co.*, 4 Abb. N. S. 378; S. C., 36 How. 20; 53 Barb. 513. An action against an Indian, upon a contract made by him, is not within the jurisdiction of a court of this State. *Hastings v. Farmer*, 4 N. Y. (4 Comst.) 293.

c. Jurisdiction as to amount. In some cases there is a jurisdictional limitation imposed as to the power of the court, in reference to the amount involved in the suit, and where this amount exceeds a certain sum the plaintiff cannot bring his action in a certain class of courts. Thus, "the county courts shall have jurisdiction in civil actions where the relief demanded is the recovery of a sum of money not exceeding one thousand dollars." Laws of 1870, ch. 467, § 1. And an action brought in one of these courts, where the relief demanded exceeds this sum, would be dismissed for want of jurisdiction as to amount, unless the complaint should be so amended as to set forth a demand within the jurisdiction of that court. *Woolley v. Wilber*, 4 Denio, 570; *Yager v. Hannah*, 6 Hill, 631.

d. What objection to jurisdiction cannot be waived. A party is at liberty in all cases to show the want of jurisdiction in relation to the subject-matter of a suit, and the objection to the jurisdiction of the court on this ground is one that cannot be waived.

Statutory limitations as to place — Choice of place.

Dudley v. Mayhew, 8 N. Y. (3 Comst.) 9; *Beach v. Nixon*, 9 N. Y. (5 Seld.) 36; *Noyes v. Butler*, 6 Barb. 613; *Coffin v. Tracy*, 3 Caines, 129.

Section 2. Statutory limitations as to place.

a. Action must be brought in the county designated by statute. Certain statutory limitations exist, under the provisions of the Code, whereby the plaintiff, in bringing his action, must fix the place of trial in the county in which the subject of the action, or some part thereof, is situated (Code, § 132), and in other cases, in the county where the cause of action, or some part thereof, arose. Code, § 124. And if an action for any of the causes specified in either of the above sections be brought elsewhere, it will be ordered to be tried in the proper county if an application therefor be made in due time and manner.

b. Waiver of objection. The statutory provision, however, may be waived, and the omission to raise the objection to the jurisdiction on the trial will be regarded as a waiver, by which the defendant is concluded. *Howland v. Willetts*, 5 Sandf. 219; S. C. affirmed, 9 N. Y. (5 Seld.) 171. It is also a well-established rule that a defendant, by voluntarily appearing and answering, thereby waives the objection, that the court has no jurisdiction of his person. *Mahaney v. Penman*, 4 Duer, 603; 1 Abb. 34; *Ayres v. Western R. R. Co.*, 48 Barb. 132; S. C., 32 How. 351; 2 Wait's Law and Prac. 17, 19.

ARTICLE III.

IN WHAT CASES THE PLAINTIFF HAS A CHOICE AS TO COURTS OR PLACE.

Section 1. Choice of place.

a. Actions for a penalty for an offense committed on a lake or river. In some cases the plaintiff has a choice of the court in which to sue, or the place to bring his action. Thus, in an action for the recovery of a penalty or forfeiture imposed by statute, for an offense committed on a lake, river, or other stream of water situated in two or more counties, the place of trial may be fixed in any county bordering on such lake, river or stream, and opposite to the place where the offense was committed. Code, § 124, sub. 1.

b. Where the parties reside in different counties. The choice of place may also be exercised where the parties reside in different counties. Thus, in an action in the nature of a *quo warranto*

Choice of place — Choice of courts.

the place of trial may properly be laid in any county in the State—the people being a party whose residence extends to every county. *People v. Cook*, 6 How. 448. And a railroad corporation must be treated as an inhabitant and freeholder in each county through which its track extends, and may be sued in any such county. *Sherwood v. Saratoga & Washington R. R. Co.*, 15 Barb. 650; *Belden v. New York & Harlem R. R. Co.*, 15 How. 17. See *Wilde v. New York & Harlem R. R. Co.*, 1 Hilt. 302; 2 Wait's Law and Prac. 79, 80.

c. Where both parties are non-residents. Where both parties are non-residents of the State, the place of trial may be laid in any county which the plaintiff shall designate in his complaint. Code, § 125. The case of non-resident parties to an action, under the Code, is the only one in which an action is still strictly transitory, and consequently the only one in which an uncontrolled discretion still rests with the plaintiff of fixing the venue in any county he may select. *Houck v. Lasher*, 17 How. 520.

d. When lands without the State are the subject of the action. When lands without the State are the subject of the action, the rule, under section 123 of the Code, providing "that an action relating to lands is local, and can only be tried in the county where the lands are situated," has no application, and the place of trial may be laid in any county otherwise proper. *Mussina v. Belden*, 6 Abb. 165; *Newton v. Bronson*, 13 N. Y. (3 Kern.) 587. See *ante*, 17.

Section 2. Choice of courts. Where courts have concurrent jurisdiction over the subject-matter of an action, and over the parties to it, the plaintiff may make choice of one in which to sue. The circumstances to be considered in determining this choice will be noticed in the following article.

ARTICLE IV.

CONSIDERATIONS IN DETERMINING CHOICE.

Section 1. Choice of court.

a. Costs. A plaintiff ought always to consider the question of costs before commencing an action. If he is certain to recover a judgment, it is also important that such judgment should carry the full costs of the action, as he may otherwise be the loser in

Choice of place — Local prejudice.

money, though he should gain the suit. In some classes of actions the plaintiff must recover fifty dollars, or more, to entitle him to costs. Code, § 304. In other actions he cannot recover more costs than the sum awarded as damages. Code, § 304. Beside this, there are cases in which the plaintiff may recover some amount of damages, and yet be liable to the defendant for the costs of the action; for, when the plaintiff is not entitled to recover costs, the defendant will recover costs, as of course. Code, § 305. To avoid the risk of costs, the plaintiff will usually prefer to bring his action in one of the inferior courts which has jurisdiction of the subject-matter, and of the party to be made defendant, in all cases where the amount of the recovery is doubtful, and where it will not probably exceed the jurisdiction of such inferior court. If such court has no jurisdiction of the subject-matter, then it will be important to determine whether to sue in a superior court. When there is a certainty of recovering a sum large enough to carry costs in a superior court, the costs so awarded will be available in paying the expense of the litigation, and in some cases the amount may be sufficient to indemnify the plaintiff for the sum paid to his attorney. These brief suggestions will serve to remind the parties that the matter of costs is worthy of their notice.

Section 2. Choice of place.

a. Witnesses, etc. If the law fixes the place of trial, that place must be selected, subject to the right to apply to the court for a change of the place of trial.

But, where the plaintiff is at liberty to select the place of trial, it will always be important to consider the residence of his witnesses, for, if they reside near the court, their attendance is more easily and more certainly secured, and the expense and delay of long journeys will be avoided. The residence of the party and of his attorney or counsel may sometimes have an important bearing upon this question. Again, the probable state of the calendar will have its influence, for a very large calendar with a cause far down upon it will not be a desirable condition for a litigant party.

Section 3. Local prejudice.

In general. A fair impartial trial is, or ought to be, the first wish on the part of a plaintiff, and as he may sometimes select the place of trial, he will not choose a place in which there exists a strong prejudice against his claim, or against himself.

Nature and service of process.

The courts are desirous of securing fair trials of all causes, and they will change the place of trial whenever such an act shall be necessary to secure an impartial jury. Where the plaintiff has a choice of places in which to bring his action, he will be able to do justice to himself; and, if it becomes necessary to change the place of trial so selected, the court may order such change to be made upon proper cause shown. See Changing place of trial.

Section 4. Nature and service of process.

a. In general. In some cases an inferior court may have jurisdiction of the subject-matter of the action, and yet it may not be desirable to sue in that court, on account of its want of power in some other respects. If a defendant evades the service of process, a court of record will order a substituted service in a proper case, which an inferior court cannot do. If a provisional remedy is desirable, a court of record is the proper court to award it. If the cause is of an equitable nature, or one in which proceedings of that character may be taken, a court of record will be preferred.

Again, the defendant may reside in a county remote from the residence of the plaintiff, and, in an action in the supreme court, the process may be served at any place within the State, and the action tried in the county of the plaintiff's residence. This will obviate the necessity of prosecuting the action in the county in which the defendant resides, or where he may be found, and process served on him. If a summons is to be served by publication, it must be done in actions in courts of record. There may be other particulars in which the character of the process desired will influence the choice of court, and of this each case will be determined upon its circumstances.

CHAPTER XI.

OF LEAVE TO BRING OR TO DEFEND ACTIONS.

ARTICLE I.

GENERAL RULES.

Section 1. Leave to sue in general. As a general rule, actions may be commenced without leave of court. On the other hand, there are some classes of actions in which the courts should be applied to for leave to sue. The necessity for such application always arises from some special character of the parties, either as plaintiff or defendant, hence it is always proper, before commencing an action, to ascertain whether or not it is one of those requiring an application for leave to sue. This will depend upon the fact whether or not any of the parties to the action are under the control or protection of the court. If they are not, then leave to sue is unnecessary; if they are, then it is necessary.

Nevertheless, the permission of a court to sue is not, in any case, an element of the cause of action. See *Chautauque Bank v. Risley*, 19 N. Y. (5 Smith) 369 (376); *Lane v. Salter*, 4 Rob. 239.

Nor is it necessary, where such permission is granted, to bring the action *in the same court* in which the judgment was rendered (*National Banking Association v. Usher*, 1 Sweeny, 403), although it seems the application for leave to sue must be made to the *court which has control* of the judgment and execution. *Graham v. Scripture*, 26 How. 501; *Lyon v. Manley*, 18 id. 267; S. C., 32 Barb. 51: 10 Abb. 337.

ARTICLE II.

ACTIONS UPON JUDGMENTS.

Section 1. When leave to sue not necessary.

a. In general. Leave to sue is unnecessary where the proceeding is one other than an action upon a judgment, rendered by a court of this State, or where it is not between the

Judgment against joint debtors, etc.

original parties to the judgment. See Code, § 71; *Kopper v. Howe*, 2 Hilt. 69; *Tuffts v. Braisted*, 1 Abb. 83; S. C., 4 Duer, 607; *McButt v. Hirsch*, 4 Abb. 441; *Wheeler v. Dakin*, 12 How. 537.

b. Judgment against joint debtors, etc. A special proceeding, under the provisions of the Code, to render a judgment against joint debtors binding upon the defendants not served, may be pursued without leave of court. Code, §§ 375 to 381; *Lane v. Salter*, 4 Rob. 239; or, if preferred, a new action may be commenced for a like purpose. *Dean v. Eldridge*, 29 How. 218; *Prince v. Cujas*, 7 Rob. 77, *contra*. See *Lane v. Salter*, 4 id. 239, 247.

c. Creditor's bill. An action in the nature of a creditor's suit is not within the meaning of the prohibition contained in the 71st section of the Code, and an application for leave to commence the action is unnecessary. *Dunham v. Nicholson*, 2 Sandf. 636; *Quick v. Keeler*, id. 231; *Catlin v. Doughty*, 12 How. 457 (460).

d. Assignee of a judgment. As has been previously stated, the section of the Code prohibiting the commencement of an action upon a judgment rendered in any court of this State, without leave of court being first obtained, applies only to such actions upon judgment as are brought by the party in whose favor such judgment was rendered, and as to those against whom it was rendered. It does not prohibit a *bona fide* assignee of a judgment from bringing an action upon it without first obtaining leave of the court. *Tuffts v. Braisted*, 1 Abb. 83; S. C., 4 Duer, 607; *McButt v. Hirsch*, 4 Abb. 441; *Wheeler v. Dakin*, 12 How. 537; *Kopper v. Howe*, 2 Hilt. 69.

e. Executor or administrator of a deceased judgment creditor The actions referred to in section 71 of the Code as actions on judgments, and in respect to which leave of court must be obtained before suit, are actions to recover of the defendant the amount due on the judgment as any other money demand would be recovered, using the judgment only as evidence of the amount of the debt; or, in other words, such actions as would have been actions of debt on judgment, under the former practice. The prohibition of the section does not apply to an action by the executor or administrator of a deceased judgment creditor, when brought for the purpose of obtaining execution on the judgment. *Wheeler v. Dakin*, 12 How. 540; *Ireland v. Litch-*

When leave to sue is necessary.

field, 22 id. 178; S. C., 8 Bosw. 634; *Jay v. Martine*, 2 Duer, 654. See sub. c, *ante*, 192.

f. Counterclaim. Nor is the setting up of a judgment previously recovered by the defendant against the plaintiff, as a counterclaim, a violation of the statute. *Wells v. Henshaw*, 3 Bosw. 625. And so of the setting up a justice's judgment by an assignee thereof. *Clark v. Story*, 29 Barb. 295.

Section 2. When leave to sue is necessary.

a. General rule. No action can be brought upon a judgment rendered in any court in this State (except a court of a justice of the peace), between the same parties, without leave of the court, for good cause shown, on notice to the adverse party. Code, § 71. See *Catlin v. Doughty*, 12 How. 457, 460.

This rule is applicable to judgments obtained before, as well as to those rendered since, the enactment of the Code. *Finch v. Carpenter*, 5 Abb. 225. And it is, as will be seen by a reference to the section, the mere imposing of a condition precedent to the bringing of an action upon a judgment of a court of record. *Graham v. Scripture*, 26 How. 501.

b. Marine and district courts of the city of New York. The exception contained in section 71 of the Code, exempting actions upon judgments rendered in courts of justices of the peace from the general rule there given, does not extend to actions upon judgments rendered in inferior courts in cities. It is necessary, notwithstanding this exception, to obtain leave to sue before commencing an action on a judgment rendered in the marine court, or the district courts of the city of New York. *Thompson v. Sutphen*, 2 E. D. Smith, 527; *Mills v. Winslow*, id. 18; S. C., 3 Code R. 44; *Kopper v. Howe*, 2 Hilt. 69. See *Boston Silk and Woolen Mills v. Eull*, 1 Sweeny, 359; S. C., 37 How. 299; 6 Abb. N. S. 319.

c. Insolvent's discharge. Where the question to be determined is, whether a judgment is or is not extinguished by a subsequent discharge of the judgment debtor, as an insolvent, leave of court to sue upon the judgment must be obtained before action. *Smith v. Paul*, 20 How. 97.

Section 3. Proceedings if action improperly brought.

a. By motion. An omission to obtain leave of court to commence an action is merely an irregularity, which may be waived by the opposite party if he do not object in proper time and manner. *Lane v. Salter*, 4 Rob. 239. The defendant should

Justices' judgments.

move to set aside the summons and complaint, upon affidavits showing that leave to sue has not been obtained. *Finch v. Carpenter*, 5 Abb. 225. See *Prince v. Cujas*, 7 Rob. 76. Upon such motion the court will not grant the plaintiff leave to sue *nunc pro tunc*, but will leave him to make a substantive motion on his own part, so as to give the defendant an opportunity to answer the affidavits made for that purpose. *Ib.*

b. District court of New York city. Where an action is brought in this court on a judgment of the same court, without leave, it is held that the court is without jurisdiction, and that a judgment rendered for the plaintiff will be reversed on appeal. *Thompson v. Sutphen*, 2 E. D. Smith, 527; *Mills v. Winslow*, *id.* 18; S. C., 3 Code R. 44.

Section 4. Justices' judgments.

a. General rule. No action on a judgment rendered by a justice of the peace can be brought in the same county within five years after its rendition, except in case of the justice's death, resignation, incapacity or removal from the county, or, except in cases where process was not personally served on the defendant, or on all the defendants, or some of the parties are dead, or the docket or record of such judgment is lost or destroyed. Code, § 71; 1 Wait's Law & Prac. 597 to 602.

This rule operates as a limited prohibition against bringing an action on a justice's judgment, and only extends to a period of five years after the rendition of such judgment. *Humphrey v. Persons*, 23 Barb. 316.

b. Counterclaim. But this prohibition does not prevent the setting up of such a judgment as a defense or counterclaim within five years after its rendition. *Clark v. Story*, 29 Barb. 295. See *Wells v. Henshaw*, 3 Bosw. 625; *contra*, *Smith v. Jones*, 2 Code R. 78.

c. Transcript docketed with county clerk. From the time a justice's judgment is docketed with the county clerk, it becomes a judgment of the county court, and an action cannot be brought upon it without leave of that court. *Lyon v. Manly*, 32 Barb. 51; 10 Abb. 337; 18 How. 267. See *Graham v. Scripture*, 26 *id.* 501.

ARTICLE III.

ACTIONS UPON OFFICIAL BONDS.

Section 1. Actions upon sheriffs' bonds.

a. General rule. "Whenever a sheriff shall have become liable for the escape of any prisoner committed to his custody, or whenever he shall have been guilty of any default or misconduct in his office, the party injured thereby may apply to the supreme court for leave to prosecute the official bond of said sheriff." 2 R. S. 476 (498), § 1.

Where a judgment has been obtained against a sheriff for an escape, leave to prosecute his official bond for such cause will be granted in case a stay of proceedings has not been ordered upon such judgment. *Chamberlain's Case*, 42 Barb. 281; 28 How. 1; 18 Abb. 103. Where a sheriff, under and by virtue of a process against the property of the defendant, seizes the goods of another person, he is guilty of official misconduct, and he and his sureties become liable upon his official bond. *People ex rel. Kellogg v. Schuyler*, 4 N. Y. (4 Comst.) 173. But before this liability can be enforced by action, leave of court must be obtained as provided in the statute before cited.

b. Application for leave. The application for leave to sue in such cases must be accompanied by proof of the default or delinquency complained of, and that no satisfaction for the same has been received; and by a certified copy of such official bond. 2 R. S. 476, § 2 (498); *Matter of Chamberlain*, 28 How. 1; S. C., 18 Abb. 103; 42 Barb. 281.

Where the default complained of consists in the non-payment of money, it must be shown that it has been demanded of the sheriff. *Rhineland v. Mather*, 5 Wend. 102.

It is unnecessary to show a previous judgment against the sheriff personally. *Chester's Case*, 5 Hill, 555.

c. Order granting leave. "Upon such application and proof, the court shall order that such bond be prosecuted; and the applicant shall thereupon be authorized to prosecute the same, in the said supreme court only, in the name of the people of this State, stating in the process, pleadings, proceedings and record in such action that the same is brought on the relation of such applicant." 2 R. S. 476, § 3 (498).

§ 3. *Order granting leave to prosecute sheriff's bond.*

SUPREME COURT.

In the matter of the application
of John Den.

} At a special term (as in p. 199).

On reading and filing the (affidavit of John Den) bearing date the day of , 18 , and a certified copy of the bond of Richard Fen, sheriff of the county of ,

ORDERED: That the said John Den have leave to prosecute the official bond of the said Richard Fen in the name of the people of this State, and to recover to his own use the amount of the loss and damage accruing to him by reason of the premises.

Section 2. Action upon other official bonds.

a. Surrogates' bonds. The statute also provides that, whenever the surrogate of any county shall be guilty of any default or misconduct in his office, the party aggrieved thereby may apply to the court of chancery (now the supreme court) for leave to prosecute the official bond of such surrogate. 2 R. S. 479, § 19 (501).

It also provides that the application shall be accompanied by the same proof required in proceedings on sheriffs' bonds; and that, upon such leave being granted, the applicant shall be authorized to prosecute the bond in the name of the people, subject, in all respects, to the provisions of the statute in respect to suits on the official bond of sheriffs. *Ib.*, § 20.

b. Bond of the clerk of the city and county of New York. The same proceedings may be had upon the bond of the clerk of the city and county of New York; but the application may be made to the New York common pleas, as well as to the supreme court, and the action may be brought in either of those courts, or in the superior court. 2 R. S. 479, § 24 (501).

c. City marshal's bond. So, the bond of the marshal of any city may be prosecuted in the same manner; but the application for leave to prosecute *may* be made to the mayor's court of such city, and the action may be there prosecuted. 2 R. S. 480, § 26 (502).

d. Constable's bond of the city of New York. The bond of a constable of the city of New York can only be prosecuted after judgment against such constable, and after leave is obtained, on motion made in the New York common pleas, in open court. *Davis v. Kruger*, 4 E. D. Smith, 350.

Actions upon bonds or undertakings given in the course of an action.

e. Guardian's bond. It is no defense to an action upon the bond of the guardian of an infant that such action has been instituted without leave of the court in which the bond was taken. But if the action has been so commenced, it may be restrained. *Cuddeback v. Kent*, 5 Paige, 92. See 2 R. S. 194, § 173 (203); *Salisbury v. Van Hoesen*, 3 Hill, 77.

Section 3. Actions upon bonds or undertakings given in the course of an action.

a. In general. Bonds and undertakings given in the course of an action, although not strictly within the definition of official bonds, are still so nearly related to the latter as to permit of their arrangement under this chapter. They will, therefore, be noticed in this connection, and those cases, in which leave to sue may be necessary, pointed out.

b. Bond on a ne exeat. A bond given on the arrest of a defendant upon a *ne exeat* cannot be prosecuted without leave of court. *Harris v. Hardy*, 3 Hill, 393. But if an action is commenced thereon without first obtaining leave of court, the defendant's only remedy is by motion to set aside the proceedings. *Ib.*

c. Injunction bond. So, under the former practice, an action could not be brought upon an injunction bond without leave of the court. *Higgins v. Allen*, 6 How. 31. See 2 R. S. 190, § 150 (198). See, also, *N. Y. Central Ins. Co. v. Safford*, 10 How. 344.

d. Undertakings given on appeal. Where an undertaking given on appeal has been forfeited by an affirmance, and non-payment of the judgment appealed from, it may be prosecuted without leave of court. *N. Y. Central Ins. Co. v. Safford*, 10 How. 344.

e. Attachment. An action to obtain possession of property belonging to the defendant in an attachment suit may be brought by a sheriff, without leave of court. *Kelly v. Breusing*, 33 Barb. 123; affirming 32 *id.* 601.

ARTICLE IV.

ACTIONS BY AND AGAINST RECEIVERS, ETC.

Section 1. Actions by receivers.

a. Leave to sue. As a general rule, a receiver cannot prosecute or defend an action without express leave of court. *Phelps v.*

Cole, 3 Code R. 157; *Meritt v. Lyon*, 16 Wend. 410; *Matter of Bangs*, 15 Barb. 266. If he does, he proceeds at his own peril, in regard to costs. *Phelps v. Cole*, 3 Code R. 157; *Smith v. Woodruff*, 6 Abb. 65. If he obtain leave to sue, he is generally bound to prosecute the action. *Winfield v. Bacon*, 24 Barb. 154.

b. Ejectment. A receiver cannot bring an action of ejectment without leave of court. *Wynne v. Newborough*, 1 Ves. Jr. 165; 3 Bro. C. C. 87; *Meritt v. Lyon*, 16 Wend. 410.

c. Insolvent corporations. A receiver of an insolvent corporation cannot interfere in a case, as by giving notice of a motion or conducting an appeal in his own name, unless he has been made a party to the action by an order of the court. *Tracy v. First National Bank of Selma*, 37 N. Y. (10 Tiff.) 523; 5 Trans. App. 14; *Wait's Code*, 423.

d. Receivers appointed in other States. Receivers appointed in other States may sue, as such, in the courts of this State. *Runk v. St. John*, 29 Barb. 585.

e. Supplementary proceedings. A receiver appointed in supplementary proceedings has a general authority to sue for all debts or demands belonging to the judgment debtor. Rule 93, Sup. Court. But if he exercise this authority without express leave of the court, he will, as a general rule, be personally liable for costs. *Smith v. Woodruff*, 6 Abb. 65.

So he may bring an action to recover back an excess of usurious interest paid by the judgment debtor, but at his risk of costs if he fail in the action. *Palen v. Johnson*, 46 Barb. 21; *Palen v. Bushnell*, id. 24.

So, also, he may bring an action in the nature of a creditor's bill to set aside an assignment made by the debtor in fraud of his creditors. *Porter v. Williams*, 9 N. Y. (5 Seld.) 142; 12 How. 107. See *Bennett v. McGuire*, 58 Barb. 625.

f. Application for leave. This application for leave to sue is *ex parte* in its nature, and may be made upon affidavits showing the facts which render a suit expedient; but the better course is to present such facts in the form of a verified petition.

g. Petition of receiver for leave to commence an action.

(Title of action.)

To the Supreme Court of the State of New York (or other court whose officer he is):

The petition of R. C., receiver, respectfully shows:

Order granting receiver leave to sue.

1. That by an order of this court, made at a special term, held at _____, on the _____ day of _____, 18____, your petitioner was appointed receiver of (all the property and effects of the late firm of A. and B.) in the pleadings in the above-entitled cause mentioned.

2. That your petitioner duly filed approved security, and took possession of the said (property and effects).

3. (State briefly the cause or causes of action, as they would be stated in a concise complaint; thus:) That among other debts due the said firm, is one of _____ dollars, due from C. D., of, etc., the particulars of which are set forth in a schedule hereto annexed.

4. That your petitioner has used every effort to settle the said claim without litigation, but has been unable to obtain payment of the same.

5. That your petitioner has made diligent inquiry in relation to the pecuniary standing of the said C. D., and from such inquiry he is (informed and believes that the said C. D. is able to pay said debt, and that a judgment against him could be satisfied out of his property, and that he is further advised by his counsel, R. H. Rosa, Esq., and believes that he has a good cause of action against said C. D., as aforesaid).

Your petitioner, therefore, prays that he may be allowed, as such receiver, to commence, continue and perfect an action in (any court of this State) against the said C. D., and for such other or further order as to the court may seem meet.

(Date.)

(Signature.)

(Verification the same as to a complaint.)

h. Order granting receiver leave to sue.

SUPREME COURT.

John Doe

agst.

Richard Roe.

At a special term of this court, held at _____, in the county of _____, on the _____ day of _____, 18____.

PRESENT: Hon. _____, Justice.

On reading and filing the petition of R. C., dated the _____ day of _____, 18____, the receiver appointed in this action, and on motion of (R. H. Rosa, Esq.), of counsel for the same,

ORDERED: That the said R. C., as receiver aforesaid, do commence and perfect an action in a court of record in this State, against C. D., of _____, for the sum of _____ dollars, according to the prayer of said petition.

Section 2. Actions against receivers, etc.

a. Leave to sue. An action against a receiver cannot be commenced without the permission of the court which appointed

Ejectment — Injunction — Leave not obtained — Application for leave.

him. *Degroot v. Jay*, 30 Barb. 483; *Higgins v. Wright*, 43 id. 461, 468; 9 Abb. 364; *Angel v. Smith*, 9 Ves. Jr. 335. See *Hubbell v. Dana*, 9 How. 424; Wait's Code, 423.

b. Ejectment. In this action such permission must be obtained before this action can be properly commenced. *Angel v. Smith*, 9 Ves. Jr. 335.

c. Injunction. So, also, an injunction will not be issued to restrain a receiver from prosecuting a suit which he has commenced with leave of court. The proper remedy in such case is to apply to the court which appointed him for instructions. *Winfield v. Bacon*, 24 Barb. 154; *Van Rensselaer v. Emery*, 9 How. 135.

d. Leave not obtained. Omitting to obtain leave of court before commencing an action against a receiver is a contempt of court. *Taylor v. Baldwin*, 14 Abb. 166; *De Groot v. Jay*, 30 Barb. 483; S. C., 9 Abb. 364; *Edwards v. Bostwick*, N. Y. Trans., Feb. 8, 1860; *Noe v. Gibson*, 7 Paige, 513. See *Chautauque Bank v. Risley*, 19 N. Y. (5 Smith) 376. But the omission is an irregularity which may be waived by an appearance in the case without objection. *Hubbell v. Dana*, 9 How. 424. See *Jay's Case*, 6 Abb. 293; *Parker v. Browning*, 8 Paige, 389; and if judgment is once obtained in an action so commenced and prosecuted it will be valid. *Chautauque Bank v. Risley*, 19 N. Y. (5 Smith) 376.

e. Application for leave. The application for leave to commence an action against a receiver seems to be a special proceeding similar to that in the case of a lunatic. Thus, if the claim appears to be just, the court will direct it to be paid out of the fund in the hands of the receiver; or, if the claim is disputed, may refer it; such a course is better than to grant permission to commence an action. See *De Groot v. Jay*, 9 Abb. 365; S. C., 30 Barb. 483; but such a disposition cannot always be made, as in those cases where other parties are interested whose rights cannot be settled by a reference.

The receiver is not entitled to notice of the application as a matter of right, but it is better to give him such notice, otherwise he may obtain a revocation of the order without notice, if it was made out of court.

f. Referee. An action against a referee, in partition, for money in his possession, as such referee, cannot be commenced without leave of court. *Higgins v. Wright*, 43 Barb. 462.

Petition for leave to sue a Receiver — Actions by lunatics, etc.

Petition for leave to sue a Receiver.

To the Court of the of
(or, To Hon. William L. Learned, a Justice of the Supreme Court.)

The petition of John Doe, of , respectfully shows :

1. That John Smith, of , was heretofore appointed receiver of (describe estate briefly) by your (honorable court).
2. (State cause of action.)
3. (Set forth the reasons why an action is preferable to a reference.)

Wherefore your petitioner prays an order of (this court) permitting him to bring an action in court against the said John Smith, as receiver aforesaid, and for such other or further relief as to (the court or your honor) may seem meet.

(Dated.)

(Signature.)

(Verification the same as to a complaint.)

Order granting leave to sue Receiver.

SUPREME COURT.

In the matter of the application of John Doe. } At a special term (as in p. 199.)

On reading and filing the petition of John Doe, and on motion of D. C. Herrick, Esq., of counsel for the petitioner, after hearing of W., of counsel for John Smith, receiver.

ORDERED : That the said John Doe have leave to commence an action against the said John Smith, as receiver of (describe the estate), for (state object of action) in (this court).

ARTICLE V.

ACTIONS BY AND AGAINST LUNATICS, ETC.

Section 1. Actions by lunatics, etc.

a. *How commenced.* All suits affecting the person or property of a person who has been judicially declared to be a lunatic, or a habitual drunkard, must be prosecuted in his own name and by his next friend ; except those suits which, by statute, may be commenced in the name of his committee. See *McKillip v. McKillip*, 8 Barb. 552 ; *Petrie v. Shoemaker*, 24 Wend. 85.

The property and person of a lunatic being under the protection and control of the court, it follows, as a matter of course,

Actions against lunatics, etc.

that he cannot commence an action without leave of court. See *Brown v. Nichols*, 9 Abb. N. S. 1; S. C., 42 N. Y. (3 Hand) 26; *Matter of Heller*, 3 Paige, 199.

Section 2. Actions against lunatics, etc.

a. Leave to sue necessary. An action cannot be commenced against the estate of a lunatic for whom a committee has been appointed, without express leave of court. *Williams v. Cameron*, 26 Barb. 172; *Soverhill v. Dickson*, 5 How. 109; S. C., 3 Code R. 162; *Crippen v. Culver*, 13 Barb. 424 (428); *Matter of Hopper*, 5 Paige, 490; *Matter of Heller*, 3 id. 201. See *Brown v. Nichols*, 42 N. Y. (3 Hand) 26; 9 Abb. N. S. 1.

The same rule applies to the commencement of actions against the estate of a habitual drunkard. *Hall v. Taylor*, 8 How. 428.

b. Commencing without leave. Where an action is commenced against a lunatic without leave, the proper course is to apply to the court which appointed the committee for an order to restrain the prosecution of the suit, and to punish the plaintiff for contempt. *Crippen v. Culver*, 13 Barb. 424; *Brown v. Nichols*, 9 Abb. N. S. 1; S. C., 42 N. Y. (3 Hand) 26. See *Clark v. Dunham*, 4 Denio, 262.

In such case, if a judgment is obtained, it is merely voidable and not void. *Brown v. Nichols*, 9 Abb. N. S. 1; S. C., 42 N. Y. (3 Hand) 26; *Sternbergh v. Schoolcraft*, 2 Barb. 153. See *Crippen v. Culver*, 13 id. 424.

c. Application for leave. This application is a special proceeding. See *Williams v. Cameron*, 26 Barb. 172. It must be made to the supreme court (or county court which appointed the committee, where such is the case) for leave to sue, or for a reference to inquire and report what is due the petitioner. *Ib.* *Hall v. Taylor*, 8 How. 429; *Soverhill v. Dickson*, 5 id. 109.

On such application, if the petitioner's claim is undisputed, the court will order the committee to pay it, or, if the claim is seriously disputed, order a reference or grant permission to bring an action. *Soverhill v. Dickson*, 5 How. 109; *Williams v. Cameron*, 26 Barb. 172; *Hull v. Taylor*, 8 How. 429; *Matter of Hopper*, 5 Paige, 489. A reference is generally preferred to an action. *Williams v. Cameron*, 26 Barb. 176.

d. Petition for leave to sue the committee of a Lunatic, etc.

To the Supreme Court of the State of New York (or other court):

The petition of John Doe, of, etc., respectfully shows:

Order granting leave to sue the committee of a lunatic, etc.

1. That Richard Roe, of, etc., is justly indebted to your petitioner in the sum of dollars, with interest thereon, from the day of , 18 , for (state briefly the cause or causes of indebtedness, as they would be stated in a concise complaint), that an account of the (goods, etc., so furnished as aforesaid), is hereunto annexed, marked schedule "A," that the items mentioned in said account (or in said account last aforesaid) are in all respects correct, that (the goods, etc., there charged were, in fact, delivered to the said Richard Roe, at the times stated in said account) and that no part of said account has been paid or satisfied (except the sum of dollars, stated therein).

2. That your petitioner is informed and believes that the said Richard Roe has been declared a lunatic by the supreme court (or other court) and, that John Smith, residing at , in the county of , is now the committee of his person and estate; and, that he has been such committee for several months last past.

3. That your petitioner has duly presented the said accounts (or, has caused said accounts to be duly presented) to the said committee for payment; but the said committee declined (or refused, or neglected) to pay the same, or any part thereof; and the sum of dollars, with interest as aforesaid, is now justly due to your petitioner.

Wherefore your petitioner prays the order of this court directing the said committee to pay to your petitioner the amount of his account aforesaid (or the balance due thereon), to wit, the sum of dollars, with interest thereon from the day of , 18 ; or that a reference may be ordered to pass upon the said accounts; or that your petitioner may have leave to bring an action against the said committee, to establish and adjust said accounts; or for such other or further order as to the court may seem meet.

DANIEL CAMERON,
Attorney for Petitioner.

(Signature.)

(Verification the same as to a complaint.)

e. Order granting leave to sue the committee of a Lunatic, etc.
SUPREME COURT (OR OTHER COURT).

In the matter of Richard Roe, a
lunatic. } At a special term (as in p. 199.)

On reading and filing the petition of John Doe, dated the day of , 18 , and after hearing A. B., Esq., attorney for the petitioner, and Alva H. Tremain, Esq., counsel for John Smith, committee.

ORDERED, 1: That the said John Doe have leave to bring an action in this court (or other court) against the said John Smith,

Actions by and against infants, guardians, etc.

committee, for the purpose of establishing and adjusting the claims mentioned in said petition, and the amount due thereon, if any thing, to the said petitioner.

2. That the said petitioner, if he shall think proper, may join the said Richard Roe, as a party defendant, in said action.

ARTICLE VI.

ACTIONS BY AND AGAINST INFANTS, GUARDIANS, ETC.

Section 1. Actions by infants, guardians, etc.

a. Partition. Before proceedings can be instituted by an infant for the partition of real estate, or for a sale of the same, permisison of the supreme court must be obtained. 4 R. S., Edm. ed., 604; Laws of 1852, ch. 277.

b. Leave, when granted. Leave to commence such proceedings will not be granted, unless it be made to appear to the satisfaction of the court that the interest of the infant requires such partition or sale. *Ib.* *Lansing v. Gulick*, 26 How. 250. And a report of a referee that, in his opinion, it is a proper case in which to grant such leave, is not sufficient to warrant the court in doing so. *Matter of Marsac*, 15 How. 383.

So, also, it should be shown that the co-tenants refused to purchase the infants' share in the estate, at its fair value, before permission will be granted for the commencement of a partition suit in their names. *Matter of Marsac*, 15 How. 383.

Section 2. Actions against infants, guardians, etc.

a. Guardian. As a general rule, an infant must now sue or be sued by guardian only. The Code abolishes the old practice of suing by next friend. *Hoftailing v. Teal*, 11 How. 188. See *Freyberg v. Pelerin*, 24 id. 202; *Hulbert v. Young*, 13 id. 413. And, in an action of partition, a guardian for minor defendants should be procured before service of the summons. *Althause v. Radde*, 3 Bosw. 410. See *Rogers v. McLean*, 11 Abb. 440.

A judgment obtained against an infant defendant, before the appointment of a guardian, is irregular. *Kellog v. Klock*, 2 Code R. 28; *Boylan v. McAvoy*, 29 How. 278. And such irregularity cannot be waived. *Fairweather v. Satterly*, 7 Rob. 546. See *McMurray v. McMurray*, 41 How. 41; S. C., 9 Abb. N. S. 315.

Petition by infant and guardian for leave to commence action for partition.

Section 3. Petition by an infant and guardian for leave to commence an action for partition.

To the Supreme Court of the State of New York:

The petition of John Den and Richard Fen respectfully shows:

1. That the said John Den is an infant of the age (over fourteen) years, and that he resides in _____

2. That the said Richard Fen, who resides in _____, was, on the _____ day of _____, 18____, duly appointed general guardian of said John Den, by the (surrogate of the county of _____).

3. That the said John Den is a tenant, in common with (describe co-tenants) in fee simple of certain real estate in (describe the property, and state infant's share).

4. That the following persons are interested in, or have a lien upon, said real estate, to wit: (give the names of the parties and the nature of their interests).

5. That the said real estate is now in the possession of _____.

6. That the taxes and assessments due upon the same have not been paid, but there is now due for the same the sum of _____ dollars, as your petitioners are informed and believe.

7. That the value of said real estate is about _____ dollars, that the share of said John Den is worth _____ dollars, clear of all liens, as your petitioners are informed and believe; but the amount received by the said John Den on account of the same during _____ years last past, is only _____ dollars.

8. That all the other co-tenants above named refuse to unite in the sale of said premises, or to purchase the share of your said petitioner, John Den, at any price whatever (or other facts showing why the infant should be allowed to commence an action).

9. That, by reason of the premises, the said John Den would be greatly benefited by a partition of the said property.

Wherefore your petitioners pray that the court will allow the said John Den to commence (an action) for partition and sale, if necessary, of said real estate, and that the said Richard Fen may be appointed the guardian of said John Den, to conduct the proceedings in such action on his behalf.

(Dated.)

(Signatures.)

COUNTY OF _____, ss:

The above-named John Den and Richard Fen, being duly sworn, each for himself, severally says, that the above petition is true of his own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters he believes it to be true.

(Jurat.)

(Signatures.)

Order to sue in partition — Actions by poor persons.

Section 4. Order granting leave to institute an action of partition on the part of an infant.

SUPREME COURT — COUNTY OF

In the matter of the petition of
an infant, John Den, and his
guardian, Richard Fen.

At a special term (as in p. 199.)

On reading and filing the petition of John Den, an infant, and Richard Fen, his guardian, and on motion of (A. B.) Esq., of counsel for petitioners:

ORDERED: 1. That proceedings may be commenced in this court on behalf of said John Den for a partition of the real estate described in said petition, and for a sale thereof, if it shall appear that such partition cannot be made without great prejudice to the owners.

2. That the said Richard Fen be and he hereby is appointed guardian *ad litem*, for the purposes of such proceedings, on his executing to the people of this State a bond in the penalty of dollars, to be approved by a justice of this court.

ARTICLE VII.

ACTIONS BY POOR PERSONS.

Section 1. Who may prosecute as a poor person.

a. In general. It is provided by statute that any poor person who has a cause of action against another, but is destitute of the means of defraying the expenses of a suit, may, upon application, obtain an order of the court assigning him counsel, solicitors, attorneys, and all other officers requisite for prosecuting his suit, who shall act without compensation; and also exempting him from the payment of fees to any officers or ministers of justice, and from all liability for any costs in the suit. 2 R. S. 444, 445, §§ 1-6 (463). This provision of the statute is retained under section 471 of the Code.

It is not confined to any particular form or class of actions, or to any particular class of persons, but is of general application, and extends to suits in courts of equity as well as to actions in courts of law. *Ib.*, § 6.

The only class of persons, under any construction of the statute, not entitled to this privilege are non-residents, and it is not clear that the privilege does not extend to them. See *Thomas v. Wilson*, 6 Hill, 257.

Who may prosecute — Application, how, when, and where made.

But in every case, before any order can issue granting an application for leave to sue *in forma pauperis*, it must appear to the satisfaction of the court that the applicant is in fact a pauper. *Isnard v. Cazeaux*, 1 Paige, 39; 2 R. S. 445, § 2 (464).

A party bringing an appeal cannot claim the privilege, as an appeal is not a cause of action within the meaning of the statute. *Ostrander v. Harper*, 14 How. 16; *Bolton v. Gardner*, 3 Paige, 273 (280); *Moore v. Cooley*, 2 Hill, 412; *McDonald v. Bank for Savings in New York*, 2 How. 35.

b. Married women. Under the provisions of this statute a married woman may obtain leave to prosecute *in forma pauperis* for injuries to her separate estate. *Roberti v. Carlton*, 18 How. 466. So, upon a proper application, a wife may be permitted to bring an action, *in forma pauperis*, against her husband for a separation. *Robertson v. Robertson*, 3 Paige, 387.

c. One of several plaintiffs. It is not sufficient to entitle one of several co-plaintiffs to an order granting him leave to sue as a poor person, that his application show that he is individually unable to prosecute the action by reason of poverty. The poverty and inability must be shown to extend to all the plaintiffs, or the relief will be denied. The courts will not allow responsible plaintiffs to join a pauper with themselves in an action, and thus escape liability to costs if defeated, and yet share the costs with him if successful. *Ostrander v. Harper*, 14 How. 16.

d. Costs of former suit. The fact that the party applying for leave to sue as a poor person is indebted to the same defendant for the costs of a former suit, will not defeat the application. *Roberti v. Carlton*, 18 How. 466. The statute expressly provides that liability for the costs of a former suit shall not prevent the party from prosecuting as a poor person. 2 R. S. 445, § 4 (464).

Section 2. Application, how, when, and where made.

a. Application, where made. An application for leave to sue as a poor person must be made to the court where the action is pending or in which it is intended to be brought. 2 R. S. 444, § 1 (463).

b. Application, when made. It may be made before the commencement of the action, or it may be made within any reasonable time thereafter. See 2 R. S. 444, § 1 (463). An application made after a suit has been long pending, and has been referred and noticed for hearing, will be denied. *Florence v. Bulkley*, 1

Petition for leave to sue.

Duer, 705; S. C., 12 N. Y. Leg. Obs. 28. See *Ostrander v. Harper*, 14 How. 17; *Swan v. Mathews*, 3 Duer, 613.

c. Application, notice of. An application for leave to sue *in forma pauperis* may be made *ex parte* if before suit; but, if made during the pendency of the action, must be on due notice and after due service of the moving papers on the party defendant. Eight days' notice of the application should be given, unless a shorter time is fixed by an order to show cause. *Ostrander v. Harper*, 14 How. 16; *Thomas v. Wilson*, 6 Hill, 257; *Isnard v. Cazeaux*, 1 Paige, 39. An order allowing a party to proceed as a poor person, if obtained on an *ex parte* application after the commencement of the action, will be revoked. *Ib.*

d. Petition for leave to sue. The application for leave to sue as a poor person, should be made upon a petition, showing (1) the nature of the suit brought or intended to be brought; (2) that the applicant is not worth twenty dollars, excepting the wearing apparel and furniture necessary for himself and his family, and excepting the subject-matter of the action when not in possession thereof.

This petition should be verified by the affidavit of the party seeking to be allowed to prosecute as a poor person, and should be supported by a certificate of a counselor of the court, that he has examined the claim, and is of the opinion that such poor person has a good cause of action. 2 R. S. 445, § 2 (464). An order granted on a petition by a third person will be revoked. *Wilkinson v. Belsher*, 2 Bro. C. C. 273.

Petition for leave to prosecute in forma pauperis (action not commenced).

To the Supreme Court of the State of New York (or other court):

The petition of A. B. of _____, in the county of _____, respectfully shows:

1. That (C. D., of, etc., is justly indebted to your petitioner in the sum of _____ dollars, and interest thereon from the day of _____, 18____, for work, labor and services performed by your petitioner, for the said [C. D.] at his request, during the years 18____, 18____, no part of which has been paid, *or other cause of action stated concisely*).

2. That your petitioner is a poor person and is not worth twenty dollars, excepting necessary wearing apparel, and furniture for himself and family, and the claim above mentioned.

3. That your petitioner desires to commence an action for the

The order.

recovery of said (claim), but for the reason hereinbefore stated is unable to bear the expenses of the same.

Wherefore your petitioner prays that he may be admitted to prosecute the said action as a poor person, and that, according to statute, an attorney and counselor of this court, and all other officers requisite for the prosecuting of the said action may be assigned him for that purpose.

(Date.)

(Signature.)

(Verification the same as to a complaint.)

Certificate of a Counselor (to be annexed).

To the Supreme Court of the State of New York:

I hereby certify that I have examined the claim of A. B. against C. D., set forth in the petition hereto annexed, and am of opinion that the said A. B. has a good cause of action thereon.

(Dated.)

R. C., Counselor at law.

Section 3. The order.

a In general. The court to which an application is made in the manner set forth in the preceding section, if satisfied that the facts set forth in the petition are true, and that the applicant has a meritorious cause of action, must, by order, admit him to prosecute as a poor person, and assign to him counsel, solicitors, attorneys and all other officers requisite for prosecuting his suit, who shall conduct the action free of charge. 2 R. S. 445, § 3 (464).

b. Form of order. If the order is granted on an *ex parte* application, as it may be when the application is made before a suit is commenced, it should be prepared in advance by the attorney to be in readiness for submission to the court. The order may be in the following form:

Order permitting a person to sue in forma pauperis, action not commenced.

SUPREME COURT.

In the matter of the petition of
A. B.

} At a special term (as in p. 199.)

On reading and filing the petition of A. B. above named, and the certificate of (R. C., Esq.) counselor at law, dated the day of , 18 ,

ORDERED: 1. That the said A. B. be and he is hereby admitted to prosecute as a poor person, free of all liability for costs, an action in this court against C. D. (*it may be prudent to*

210 LEAVE TO BRING OR DEFEND ACTIONS.

Petition for leave to prosecute in forma pauperis.

add: and such other persons as may be necessary parties defendant) for the recovery of (the claim mentioned in said petition).

2. That C. H. S., Esq., counselor at law, be and he is hereby assigned to said A. B. as his attorney, whose duty it shall be to conduct the said action free of charge to said A. B.

Petition for leave to prosecute in forma pauperis (action commenced).

(Title of cause.)

(As in section 2, p. 208, to the end of first paragraph; form.)

2. That your petitioner has commenced an action as above entitled for the recovery of said (claim) and (the same is now at issue).

3. That your petitioner is unable to maintain the said action by reason of the expense to which he has been, and is likely to be put to, concerning the same.

4. That your petitioner is not worth twenty dollars, excepting necessary wearing apparel and furniture for himself and family, and the claim above mentioned.

5. That your petitioner desires to continue the prosecution of said action, but for the reason hereinbefore stated (as in section 2 [form], to the end, including the certificate of a counselor of the court).

(Date.)

(Signature.)

(Verification the same as to a complaint.)

Order granting leave to continue an action in forma pauperis.

(Title of cause.)

At a special term (as in p. 199).

On reading (as in section 3, p. 209 [form], to the word "ordered").

1. That the above-named plaintiff be allowed to continue this action as a poor person, without any further liability for costs or charges.

2. That C. H. S., Esq., counselor at law, be and he is hereby assigned to said A. B. as his attorney, whose duty it shall be to conduct the said action free of charge to said A. B.

Notice of motion.

(Title of action.)

Take notice that I shall apply to the supreme court (or other court) at the next special term thereof, to be held at _____, in the county of _____, on the _____ day of _____, 18____, at _____ o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order granting the prayer of the petition, a copy of which is hereto annexed.

Yours truly,

(Dated.)

E. B., *Attorney for Plaintiff.*

Effect of the order.

c. *Effect of the order.* Any person who has thus obtained leave to sue *in forma pauperis* may prosecute his suit without paying any fees to any officers or ministers of justice, and cannot be prevented from so prosecuting by reason of his being liable for the costs of any former suit brought by him against the same defendant; and, if he is nonsuited, or a verdict or judgment is given against him, or his complaint is dismissed, or a decree rendered against him, he will not be liable for any costs in such suit. 2 R. S. 445, § 4 (464).

In ordinary cases a defendant against whom suit is brought, and to whom the plaintiff therein is indebted for the costs of a former suit, may obtain a stay of proceedings in the second suit until the costs of the first are paid, in all cases where both actions are in the same form, as where both are legal, or both are equitable. The provisions of this statute, however, expressly exempt paupers from the operation of this rule. *Kerr v. Davis*, 7 Paige, 54; *Roberti v. Carlton*, 18 How. 466.

Under the English practice, in cases of great vexation (but in such cases only), if a second suit be instituted for the same purpose for which the plaintiff formerly litigated *in forma pauperis*, proceedings in such second suit will be stayed until the costs of the former suit have been paid, even though the plaintiff may not have been dispaupered in such former suit. *Corbett v. Corbett*, 16 Ves. 407; *Wild v. Hobson*, 2 V. & B. 112; *Bowyer v. McEvoy*, 1 Ball. & Bea. 56, 562.

The exemption of the plaintiff from all costs that may accrue while prosecuting as a poor person is absolute from the time of the granting of the order until its revocation for misconduct or mismanagement in the suit. Thus, the plaintiff will not be liable to costs for not proceeding to trial pursuant to notice, if the order granting him leave to prosecute as a poor person has not been revoked. *Steele v. Mott*, 20 Wend. 679; *Rice v. Brown*, 1 Bos. & Pul. 39; *Doe v. Trussell*, 6 East, 505; *Brittain v. Greenville*, 2 Stra. 1121; *Taylor v. Lowe*, id. 983; *Blood v. Lee*, 3 Wils. 24. While the plaintiff will not be required to pay costs on his own default he may, however, receive costs for the default of the defendant. *Rice v. Brown*, 1 Bos. & Pul. 39. But the amount of costs that shall be awarded to a poor person suing as such is subject to the discretion of the court, and depends upon the circumstances of each case. *Rattray v. George*, 16 Ves. 232. Thus, a plaintiff suing *in forma pauperis*, and recovering a legacy

against executors, is entitled only to the actual costs or expenses of the suit, to be paid out of the assets. *Williams v. Wilkins*, 3 Johns. Ch. 65. So, a plaintiff suing as a poor person will not be allowed interlocutory costs where he has no reasonable hope of succeeding on the merits. *Bolton v. Gardner*, 3 Paige, 273. But full costs will be allowed on an appeal, as an appeal cannot be prosecuted *in forma pauperis*, and the parties to the appeal stand on an equal footing so far as relates to the right to costs. *Ib.*

The exemption of the plaintiff from liability to costs was held before the statute to date only from the granting of his petition to prosecute as a poor person. If the application was made during the pendency of the action, he was held liable for such costs as had previously accrued. *Brown v. Story*, 1 Paige, 588; *Filewood v. Cousens*, 1 Addams, 288. But, since the Revised Statutes, it is declared that the pauper shall not be liable for any costs in such suit. 2 R. S. 445, § 4 (464). Whether this general language has changed the practice as to costs already accrued has not been decided by the courts.

The proceedings in an action brought by a poor person, as such, are the same as in actions brought by any other person. Code, § 471.

d. Revocation of order. The statute further provides that, if the person prosecuting *in forma pauperis* be guilty of any improper conduct in the prosecution of his suit, or of any willful or unnecessary delay, the court may, in its discretion, annul the order admitting him to prosecute as a poor person; and he shall thereafter be deprived of all the privileges conferred by such order. 2 R. S. 445, § 5 (464). Thus, on the revocation of the order, the plaintiff will be liable for costs in the same manner and to the same degree as though the order had never been made. *Steele v. Mott*, 20 Wend. 679.

ARTICLE VIII.

ACTIONS BY THE ATTORNEY-GENERAL.

Section 1. In general.

a. To annul a corporation. An action may be brought by the attorney-general, in the name of the people, *on leave granted by the supreme court, or a judge thereof*, for the purpose of vacat-

Actions by Attorney-General — Remedy if leave not obtained.

ing the charter of a corporation (other than municipal), whenever such corporation shall (1) offend against any of the provisions of the acts creating, altering or renewing such corporation; or, (2) violate the provisions of any law by which such corporation shall have forfeited its charter by abuse of its powers; or, (3) whenever it shall forfeit its privileges or franchises by failure to exercise its powers; or, (4) whenever it shall do any act which amounts to a surrender of its corporate rights; or, (5) whenever it shall exercise a franchise or privilege not conferred on it by law. Code, § 430. See *People v. Lowber*, 28 Barb. 65; 8. C., 7 Abb. 158; *People v. Erie Railway Co.*, 36 How. 129; *Smith v. Metropolitan Gaslight Co.*, 12 id. 187.

b. Leave, how obtained. Leave to bring an action will be granted on an application of the attorney-general. Notice of such application may or may not be given to the corporation, according as the court or judge shall direct. Code, § 431. Such application should be made in a manner analogous to that of other officers of the court seeking its direction.

c. For intrusion into office. The foregoing provisions do not apply to suits by the same officer under the 432d and following sections of the Code. In those cases it is for the attorney-general, and not for the supreme court, to determine whether, in any particular case, an action should be brought to try the right to an office. *People v. Attorney-General*, 22 Barb. 114; 13 How. 179; 3 Abb. 131.

ARTICLE IX.

REMEDY WHEN ACTION COMMENCED WITHOUT LEAVE OBTAINED.

Section 1. Receiver. If an action is commenced against a receiver without leave of court, he may have a perpetual injunction against the suit. *De Groot v. Jay*, 9 Abb. 364; 30 Barb. 483.

Section 2. Judgments. See *ante*, 193, art. II, § 3.

Section 3. Lunatics. See *ante*, 202, art. V, § 2 (b).

ARTICLE X.

NOTICE AND DEMAND, OR REQUEST BEFORE ACTION.

Section 1. Notice.

a. In general. In many cases it is advisable, if not necessary, to give notice, make demands, and require explanations before commencing an action; such a course will often prevent litigation, but if that has to be resorted to, the party may so place himself in the right, that on this account alone he will obtain the favor of the court and jury, and, in some cases, throw the costs upon the opposite party. On the other hand, if such a course is not pursued, that fact will often render the party liable to an action, which otherwise could not have been sustained.

b. Receiver. A receiver cannot maintain an action for rent against a tenant of the estate in his possession, until he has notified such tenant of his appointment, or has demanded the rent. *Hunt v. Wolfe*, 2 Daly, 298.

c. Undertaking on appeal. So an action cannot be commenced on an undertaking given on appeal from a judgment to the general term, until ten days after the service of notice on the adverse party, of the entry of the order or judgment of affirmance. Code, § 348.

d. Nuisance. So it has been held that an action against the continuator of a private nuisance, originally erected by another, cannot be maintained, unless the plaintiff has notified the defendant of its existence and requested him to remove it. *Hubbard v. Russell*, 24 Barb. 404; but on this point see *Cohocton Stone Co. v. Buffalo, New York & Erie Railroad Co.*, 52 Barb. 390; *Brown v. Cayuga & Susquehanna Railroad Co.*, 12 N. Y. (2 Kern.) 486 (492).

e. Sheriff. So also, notice not to sell is necessary to render a sheriff liable for the levy and sale of goods belonging to another than the defendant. *Dean v. Whittaker*, 1 Carr. & P. 347.

Section 2. Demand or request.

a. When necessary. A demand or request is only necessary when the object of it is to oblige another person to do some act. *Amory v. Broderick*, 2 Chit. 329. So, where the defendant is liable, without such request, none need be made. *Smith v. Emery*, 7 Halst. 53, 61. And so, where the payment of a mere

duty is promised, no request is necessary. *Birks v. Trippet*, 1 Saund. 28 (*d*).

b. Corporation of New York. No proceedings can be taken against the corporation of New York until the plaintiff has presented his demand to the comptroller for adjustment, and has made a second demand in writing, upon that officer, after the expiration of twenty days from the first presentation of the claim. Laws of 1860, ch. 379, § 2.

c. Note. So, a demand of payment is a prerequisite to an action on a note, payable after demand. *Thorpe v. Booth*, 1 R. & M. 388; or, at a particular place. *Ferner v. Williams*, 14 Abb. 215; 37 Barb. 9. But where the place of demand is at a bank, see *Hill v. Place*, 5 Abb. N. S. 18; 36 How. 26; 7 Rob. 389.

If a note is payable on demand generally, an action may be commenced on it without a previous demand. *Hirst v. Brooks*, 50 Barb. 334; *Haxton v. Bishop*, 2 Wend. 13; *Pierce v. Forthergill*, 2 Bing. (N. C.) 567; 1 Hodges, 251; 2 Scott, 334. See *Second Avenue R. R. Co. v. Coleman*, 24 Barb. 300. So, in the case of a joint note executed by the principal debtor and another, as his surety. *Ex parte Whitworth v. Mayor*, 2 Mon. D. & D. 8, 158 (164).

d. Guarantor. A demand of the principal debtor is necessary to render one liable who merely guarantees a debt, which it is the duty of the creditor to collect. *Milliken v. Byerly*, 6 How. 214.

CHAPTER XII.

SUBMITTING CONTROVERSIES WITHOUT ACTION.

ARTICLE I.

IN WHAT CASES, AND WHAT QUESTIONS SUBMITTED.

Section 1. Civil actions. In the various transactions of life, controversies frequently arise betwixt parties who agree as to the facts of the transaction, but cannot agree as to their respective legal rights under such state of facts. To avoid the delay and expense incident to ordinary proceedings in such cases, the Code has provided that parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. Code, § 372. This amicable remedy, thus provided by the Code, is authorized only where an action might have been brought in the above cases. And the submission can be made only to a court which would have jurisdiction of such action. *American Transportation Company v. Assessors of Buffalo*, Buffalo Super. Ct. G. T. 1855, Clint. Dig. 3082.

Section 2. Who may submit. The mode of proceeding, in the submission of a controversy, is essentially founded upon the consent of the parties, and any one capable of giving a legal consent may be a party to a submission. An infant, being incapable of giving a legal consent to an agreement to submit, cannot be a party, and it seems the court has no power to appoint a guardian for such purpose. *Fisher v. Stilson*, 9 Abb. 33.

Section 3. What cannot be submitted. Section 372 of the Code does not authorize the submission of actions, the remedy being strictly confined to those cases in which no action has been brought. If the submission of the case did not of itself work a discontinuance of the action, it must do so when followed by a judgment, and meanwhile it would operate to suspend it. *Van Sickle v. Van Sickle*, 8 How. 265.

What can or cannot be submitted — Change of parties.

In questions of difference, in which an infant is legally interested, there can be no submission of such questions, under the above section of the Code. They must appear in the controversy by guardians appointed for that purpose. Code, § 115. But the court, or a judge, is not authorized, either by section 115 of the Code, or by statute, to appoint a guardian for an infant, to appear for him in a controversy, without action. It hence follows that, in controversies where infants are legally interested, the only appropriate remedy is by action. *Fisher v. Stilson*, 9 Abb. 33. Compare, however, *Brick's Estate*, 15 Abb. 12.

Section 372 of the Code makes no provision for the submission of a question to the court, merely that its opinion may be had in a case where the question has not as yet arisen, and where no judgment is demanded. The court is only authorized to render a judgment, as if an action were actually pending. *Hobart College v. Fitzhugh*, 27 N. Y. (13 Smith) 130. The court will not entertain a case where there is no matter or question in difference or controversy, between the parties submitting it, and where the object is merely to obtain the opinion of the court for the purpose of settling a doubt that may have arisen in regard to some matter or thing, or as to the construction of some instrument. *Ib.* See *Doe ex dem. Duntze v. Duntze*, 6 Man. Gr. & Scott, 100. The court said: "If the court were to entertain the question, every petty doubt that might arise upon a will, or a marriage settlement, might be made the subject of discussion before it. Conceiving it, therefore, to be inexpedient that the time of the court should be occupied with these speculative matters, we decline to give any opinion upon the case." *Ib.*

Section 4. Change of parties. Where a controversy has been submitted, new parties cannot be brought in without their consent, and the provisions of section 122 of the Code, requiring the court, under certain circumstances, to cause the absent parties to be brought in, have no application to cases submitted under section 372. Parties to a question of difference must agree upon a case, and the consent of the parties is essential to the validity of the agreement. *Hobart College v. Fitzhugh*, 27 N. Y. (13 Smith) 134.

Proceedings on submission, and proof that controversy is real.

ARTICLE II.

PROCEEDINGS ON SUBMISSION, AND PROOF THAT CONTROVERSY IS REAL.

Section 1. Affidavit. The mode of proceeding in the submission of controversies without action requires the statement of facts agreed upon by the parties to be verified by affidavit or, in the language of the Code, it must appear by affidavit that the controversy is real and the proceedings in good faith, to determine the rights of the parties. Code, § 372. This requirement of the above section limits the remedy to cases of real controversy, and to such cases only was it ever intended to apply.

Section 2. What papers furnished. The verified statement of facts agreed upon, and all the papers necessary for the argument of the case, must be furnished, duly printed, as in cases upon appeal, by the party occupying the position of plaintiff in the controversy. Sup. Ct. Rule 50.

Section 3. Must be case. In every question of difference submitted by parties, under section 372, a case must be presented for adjudication, alleging a cause of action or claiming relief. A mere difference of opinion between the parties, on the question propounded to the court, is not sufficient. The controversy must be real, and a case presented in which a judgment may be rendered in favor of one party and against the other of the parties to the submission. The nature of the judgment asked for must be indicated by the case. *Williams v. City of Rochester*, 2 Lans. 170.

Section 4. Submission is limit of power. The court in its judgment is confined to the statement of facts submitted, and has no power to grant relief not arising out of, or inconsistent with, such statement of facts. *Smith v. Hall*, Buffalo Sup. Ct. G. T., June, 1857, 4 Clint. Dig. 3082.

Section 5. Mode of trial. In a controversy submitted under section 372 of the Code, the court, at general term, has power only to determine the questions of law arising upon the agreed state of facts, and cannot, in any case, refer the facts to a jury, or vacate the submission. *Lang v. Ropke*, 1 Duer, 701; *Neilson v. Commercial Mutual Insurance Co.*, 3 id. 455; *Clark v. Wise*, 46 N. Y. (1 Sick.) 612.

Relief from submission — At what term of court — Trial.

Statement of Case.

(Entitle as if in an action.)

Case agreed upon in a controversy submitted without action.

A. B. claims to recover of E. F. dollars (or state the things claimed), and E. F. resists the said claim.

The following are the facts upon which the said controversy depends: *(State clearly and concisely as may be every fact essential to the claim or the defense.)*

None of the admissions herein contained are in any wise to affect either party, or to be regarded as made, except for the purpose of this submission of this controversy.

The questions submitted to the court upon this case are as follows: *(State with particularity and accuracy all questions intended to be raised on the facts submitted.)*

(Date.)

(Signature of both parties.)

Verification.

(Venue.)

A. B. and E. F., being duly severally sworn, says each for himself, that the controversy mentioned in the foregoing case is real, and the proceedings in good faith to determine the rights of the parties.

(Signatures.)

(Jurat.)

Section 6. Relief from submission. Neither party to a submission can be released from the legal effects of the agreement, by the court on motion, and it is only upon the most satisfactory evidence of fraud or mutual mistake that relief will be granted by a court of equity, and even then only in a suit instituted for that purpose, and on a complaint properly framed. The nature of the equitable relief thus afforded is in a form in which the decision of the court may be reviewed, and, if erroneous, reversed.

Lang v. Ropke, 1 Duer, 701.

Section 7. At what term of court. On a case being prepared and set down for argument, it assumes the character of an appeal from an ordinary judgment on a question of law; and, as there are no facts to be passed upon by a jury, the case is properly heard and determined by the court, at general term. This is, in fact, required by the express language of the Code, section 372.

Section 8. Questions of law alone considered. A case submitted under section 372 of the Code should present nothing but questions of law arising upon undisputed facts, or the case will be dismissed. *Clark v. Wise*, 46 N. Y. (1 Sick.) 612; reversing S. C., 39 How. 97; 57 Barb. 416.

New parties — Costs — Judgment — New trial in ejectment.

Section 9. New parties. No provision has been made in the Code, or elsewhere, by which new parties to an agreed state of facts may be brought in, and hence no one can be made a party without his consent. See ch. I, § 4, *ante*, 217.

Section 10. Costs. The hearing, at a general term, under section 372, is, in effect, a trial of the issues of law arising upon the agreed statement of facts, and a trial fee will be allowed. Costs "for any proceeding prior to notice of trial," as in cases of appeal, will not be allowed. *Neilson v. Mutual Insurance Co.*, 3 Duer, 683.

Section 11. Judgment. After a hearing and decision upon the questions of law arising upon the admitted facts, by the general term, judgment must be entered in the judgment book, as in other cases, the nature of the judgment being the same as that given on appeal. The case, the submission, and a copy of the judgment constitute the judgment roll. Code, § 373.

Section 12. Enforcing judgment. The judgment rendered in the decision of a submitted case may be enforced in the same manner as if rendered in an action. Code, § 374.

Judgment.

(Title of cause.)

(Caption.)

A case agreed upon between the parties above named, without action, dated the day of , 18 , and duly verified, having been submitted to this court, and, after hearing M. N., for the said A. B., and O. P., for the said E. F., and due deliberation having been had thereon,

It is ADJUDGED (*state the relief granted, as in other judgments*).

Section 13. Appeal from judgment. So, an appeal may be also had from the decision of the general term, to the court of appeals, in the same manner, and with like effect, as from a judgment rendered by the general term in ordinary actions. Code, § 374.

Section 14. New trial in ejectment. The provisions of the Revised Statutes (2 R. S. 309, § 37), granting a new trial, as of right, in ejectment cases, do not apply to a judgment rendered on a case submitted without action. The proceeding is not an action, either within the former technical meaning of an action, or within the terms of the definition given by the Code (§ 2), and, therefore, is not embraced in the above provisions. *Lang v. Ropke*, 1 Duer, 701.

PART II.

OF COURTS AND THEIR OFFICERS.

CHAPTER I.

OF COURTS GENERALLY.

ARTICLE I.

OF COURTS IN GENERAL.

Section 1. What is a court? An oft repeated and very general definition of a court is that given by Lord COKE—who describes it to be “a place wherein justice is judicially administered.” Co. Litt. 58 *a*; 3 Bl. Com. 24. The term “place,” in this definition, must, however, be understood figuratively, for a court is properly composed of persons, consisting of the judge or judges, and other proper officers, united together in a civil organization, and invested by law with the requisite functions for the administration of justice.

A modern definition, in fuller and more explicit terms than those employed by Lord COKE, describes a court “as an organized body with defined powers, meeting at certain times and places for the hearing and decision of causes and other matters brought before it, and, aided in this, its proper business, by its proper officers, viz., attorneys and counsel to present and manage the business, clerks to record and attest its acts and decisions, and ministerial officers to execute its commands and secure due order in its proceedings.” Burrill’s Dict.

In a more limited sense, the judges alone are sometimes called the court.

Section 2. General division of courts. The most general division of courts is that which makes the distinction between courts of record, and courts not of record. At common law, a court of record is one where the acts and judicial proceedings

 Essentials of every court—Courts of this State.

are enrolled in parchment for a perpetual memorial and testimony, which rolls are called the records of the court. Courts not of record comprise those inferior tribunals whose proceedings are not formally enrolled or recorded. 3 Bl. Com. 24. In this country the proceedings of courts of record are written in books kept for the purpose, or in papers kept on file in the offices of the clerks of the courts. A court which does not possess a common-law jurisdiction, and which is without a seal and clerk, is not a court of record. For the more convenient administration of justice, courts of record are divided into a variety of courts, possessing either general or limited jurisdiction. Courts of general jurisdiction, called supreme or superior courts, in some cases have original jurisdiction, while in others their province is to exercise a supervisory power over the acts and proceedings of the inferior courts of limited jurisdiction.

These inferior courts of record have, in general, original jurisdiction of cases both at law and in equity, but, in all cases, their jurisdiction must appear upon the face of their proceedings, otherwise they will be void. *Kempe v. Kennedy*, 5 Cranch, 173. Other general divisions of courts embrace courts of common law and courts of equity; courts of admiralty and maritime jurisdiction; civil and criminal courts; all of which possess some prominent features common to all, but are clearly distinguishable by features peculiar to each.

Section 3. Essentials of every court. At least three constituent parts are essential in every court; the *actor* or plaintiff, who complains of an injury done; the *reus* or defendant, who is called upon to make satisfaction for it; and the *judex* or judicial power, which is to examine the truth of the fact alleged, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain, and by its officers to apply the remedy. 3 Bl. Com. 25.

Section 4. The courts of this State. The following is a list of the courts of this State as given by the Code, part I, title I, section 9.

1. The court for the trial of impeachments; 2, the court of appeals; 3, the supreme court; 4, the circuit courts; 5, the courts of oyer and terminer; 6, the county courts; 7, the courts of sessions; 8, the courts of special sessions; 9, the surrogates' courts; 10, the courts of justices of the peace; 11, the superior court of the city of New York; 12, the court of common pleas

Of courts of law.

for the city and county of New York ; 13, the mayors' courts of cities ; 14, the recorders' courts of cities ; 15, the marine court of the city of New York ; 16, the justices' courts in the city of New York ; 17, the justices' courts of cities ; 18, the police courts.

Since the amendment of the above section of the Code in 1849, two additional courts have been established ; namely, the city court of Brooklyn, and the superior court of Buffalo ; and the designation of No. 16 has been changed from "justices' courts" to "district courts," in the city of New York.

ARTICLE II.

OF COURTS OF LAW.

Section 1. Aula regia. Courts of law are established to protect legal rights and to redress legal injuries ; and anciently, under the Saxon constitution, these important ends were sought to be attained by the establishment of but one superior court of justice in the whole kingdom, which had cognizance of spiritual as well as of civil causes. This court was called the *wittena-gemote* or general council, which assembled annually or oftener, to do private justice and to consult upon public business. After the conquest the ecclesiastical jurisdiction was gradually diverted into another channel ; and a court was established which sat in the king's hall, then called by the ancient authors *aula regia* or *aula regis*, which was composed of the great officers of State, such as the lord mareschal, who chiefly presided in matters of honor and of arms ; the lord chancellor, whose peculiar business it was to keep the great seal and examine all writs that passed under that authority, and the lord high treasurer, who was the principal adviser of the crown in matters relating to the revenue. These high officers were assisted by persons learned in the laws, called the king's justiciars or justices, and by the greater barons of parliament, all of whom had a seat in the *aula regis*, and formed a kind of court of appeal, or rather of advice, in matters of great moment and difficulty. Over all presided the chief justiciar, who was the principal minister of state, the second man in the kingdom, and, by virtue of his office, guardian of the realm in the absence of the sovereign. 3 Broom and Had. 110.

Division into district courts — State courts before Code.

Section 2. Division into district courts. The three superior courts of common law, namely, queen's bench, common pleas and exchequer, date their existence from the dissolution of the *aula regia*, toward the close of the Norman period. 2 Bac. Abr. 689. The court of queen's bench is the supreme court of common law in the kingdom, and consists of a chief justice and five puisne justices. This court still retains many features of the ancient *aula regia*, and may follow the queen's person wherever she goes, but for some centuries past has usually sat at Westminster, an ancient palace of the crown. 3 Broom & Had. 117. The court of *common pleas* was established for the purpose of determining causes purely civil, and at its first institution followed the king's person wherever he went; but by the eleventh chapter of *magna charta* was rendered stationary in Westminster Hall, where the *aula regis* originally sat, and there it has ever since remained. It consists of a chief and other justices, appointed with jurisdiction to hear and determine all pleas of land and injuries merely civil between subject and subject. 2 Bac. Abr. 697. The court of exchequer was originally set up by William the Conqueror, as a part of the *aula regis*, but received its present form from Edward I; and intended according to its original institution to have jurisdiction over all matters relating to the revenue of the crown. The judges of this court are appointed by patent, and consist of a lord chief baron, and five puisne barons, called barons of the exchequer. 3 Broom & Had. 114.

Section 3. Corresponding courts in this State prior to Code. The courts existing in this State prior to the adoption of the *Code*, corresponding with the English courts of common law, were the various courts of common pleas, established in the several counties of the State; the supreme court of the State; and the court for the correction of *errors*. The first two were courts of original jurisdiction, possessing also appellate jurisdiction from the decisions of the courts immediately below them. The court for the correction of *errors* was the highest court of judicature in the State, and was exclusively a court of appeal and review.

ARTICLE III.

OF COURTS OF EQUITY.

Section 1. Old court of chancery. The existence of courts of equity, as distinct from courts of law, has been traced back to an early period in the history of English jurisprudence, but their proceedings were conducted with little regard to accuracy or regularity until about the close of the fourteenth century, when the court of chancery, as a distinct tribunal, became firmly established, and the extent of its authority well understood.

A court of chancery was established in this State as early as the year 1683, soon after the people of the colony, under the English government, were admitted to a share in the legislative power. Afterward, by an ordinance of September 2, 1701, a court of chancery was erected, to consist of the governor and council, which was very unpopular, and met with much opposition from the general assembly till a law was passed, in 1711, empowering the governor to act as chancellor; and, in this form, the court continued to exist down to the period of the revolution.

Section 2. Recognition under colonial government and State constitution. Such acts of the colonial legislature and such English statutes and common law, as constituted the law of the State on the 19th of April, 1775 were adopted by the first State constitution, framed in 1777, excepting such portions of them as might be repugnant to the provisions of that instrument. No attempt was made to re-organize or define the jurisdiction of the court of chancery, and it was suffered to remain as it had previously existed, except that the office of chancellor was separated from that of governor, and the first chancellor appointed under the new constitution. The court, as thus organized, continued to exist, unaffected by any material constitutional changes, until it was finally abolished by the constitution of 1846.

Section 3. Merger in supreme court. The jurisdiction and power of the court of chancery were merged in that of the supreme court by the constitution of 1846, in which it was declared, as the fundamental law of the State, that there should be a supreme court, having general jurisdiction in law and equity. Const. 1846, art. VI, § 3. The judiciary act of May 12,

Organization of courts—Powers of courts and judges.

1847, designed to give practical effect to the radical changes made in the organization of the courts, provides that the supreme court, organized by this act, shall possess the same powers and exercise the same jurisdiction as is now possessed and exercised by the present supreme court and court of chancery. Laws of 1847, ch. 280, § 16. Other provisions of the same act relate to the powers and duties of the justice, terms of the court, etc., but no attempt was made to blend the two systems in practice until the adoption of the Code of Procedure of 1848.

The constitution of 1869, art. VI, § 6, retains the supreme court with a general jurisdiction in law and in equity.

ARTICLE IV.

ORGANIZATION OF COURTS.

Section 1. General requisites of organization. In the organization of a court, the first requisite to be considered is the *number of judges* of which it shall be composed, and by whom its judicial powers are to be exercised. In some courts the judicial power is exercised by a single judge (as in a court of chancery); but the ordinary common-law courts of record are composed of two, three, or more judges. The mode of their appointment, their tenure of office, their remuneration and rights, duties and disabilities generally, are matters regulated by statute. Another requisite, claiming consideration in the organization of a court is, its jurisdiction; or the nature and extent of its powers, which should be clearly defined.

The *times* and *places* of its sessions must also be regulated, and proper officers assigned to it.

ARTICLE V.

POWERS OF COURTS AND JUDGES.

Section 1. Power, whence derived. In England the king, by the common law, is regarded as the fountain of justice, and hence all the judges of the courts of common law must derive their authority from the crown by some commission warranted by law. 2 Bac. Abr. 619. In this country the sovereign people are the source of judicial power, hence all processes of the courts are issued in the name of the people; and all the judges

Power incidental to all courts of record.

of our courts must derive their authority from the will of the people, as expressed in the constitution, the acts of the legislature, and embodied in the law of the land.

Section 2. How determined. At common law the patents of the judges (by which their authority was conferred) were determined by the death of the king, in whose name they were made. 2 Bac. Abr. 622. By the constitution of the United States (art. 3, § 1), it is provided "that the judges both of the supreme and inferior courts shall hold their offices during good behavior." In some of the States the judges hold their offices during their good behavior; in others, during their good behavior, or until they shall attain a certain age; and in others for a limited time.

Section 3. Power incidental to all courts of record. All the courts of record in this State shall have power to issue process of subpoena, requiring the attendance of any witness residing or being in any part of this State, to testify in any matter or cause pending in such court; to administer oaths to witnesses in any such matter or cause, and in all other cases, where it may be necessary in the exercise of the powers and duties of such courts; to devise and make such new writs and forms of proceedings, as may be necessary to carry into effect the powers and jurisdiction possessed by them. 2 R. S. 276.

Section 4. Power to punish for contempt. The power to punish for contempt is incident to courts of law and equity. *United States v. Hudson*, 7 Cranch, 32; *Yates v. People*, 6 Johns. 337; 4 id. 316; 9 id. 395; and the cases in which this power may be exercised by the courts of this State are specified by statute. See 2 R. S. 278. "But no court can punish as a contempt the publication of true, full, and fair reports of any trial, argument, proceeding, or decision had in such court." *Ib.*

ARTICLE VI.

TERMS AND VACATIONS.

Section 1. Terms of courts. The terms of the courts are those stated periods of the year in which courts sit for the dispatch of business. 3 Bl. Com. 275. The English courts have four terms, namely, Michaelmas, Hilary, Easter and Trinity, which were gradually formed from the constitutions of the church, being

Mode of holding courts—Discontinuance and irregularities.

those leisure seasons of the year not occupied by the great festivals or fasts, or which were exempt from the general avocations of rural business. 3 Bl. Com. 276. With us the terms are usually designated by the names of the month in which they respectively commence; and their number and duration vary according to the particular organization and business of the respective courts.

Section 2. Vacations. The periods intervening between the terms are called vacations.

ARTICLE VII.

MODE OF HOLDING COURTS.

Section 1. Sittings must be public. Courts of a local character usually hold their sittings at one and the same place; but others, including most of the higher courts, sit at different places alternately in succession at places appointed for the purpose of holding the terms of the court.

“The sittings of every court within this State shall be public, and every citizen may freely attend the same. 2 R. S. 274, § 1.

Section 2. Non-judicial days. Non-judicial days are those during which no business is transacted by the courts: as Sunday or the legal holidays. It is provided by statute in this State that “no court shall be opened or transact any business on Sunday, unless it be for the purpose of receiving a verdict or discharging a jury.” 2 R. S. 275, § 7.

Though a verdict be taken, judgment must not be entered on Sunday. *Pulling v. The People*, 8 Barb. 384; and “Sunday” has been construed to mean the time from midnight to midnight, and not merely the daylight. *Butler v. Kelsey*, 15 Johns. 177; *Pulling v. The People*, 8 Barb. 384.

ARTICLE VIII.

DISCONTINUANCE AND IRREGULARITIES.

Section 1. Vacancy in office. No process, proceeding or suit, shall be discontinued on account of a vacancy in the office of any judge, or of all the judges of any court of record in this State; but their successors shall have power to continue and hear the same as if commenced before them. 2 R. S. 277, § 2.

Immunities and liabilities of judges.

Section 2. Failure to hold terms. In case any court of record fails to meet at the appointed time, such process or proceeding shall be returnable or continued at the next term in the same manner and upon the same notice as would have been required at the term which failed. *Ib.* § 3.

Section 3. Failure to adjourn. The proceedings in any court of record are not vitiated by an omission to adjourn the court from day to day, previous to the final adjournment; and the adjournment of any such court before the expiration of its term shall not affect the teste, return or service of any writs issued prior or subsequent to such adjournment. *Ib.* §§ 5, 6.

ARTICLE IX.

IMMUNITIES AND LIABILITIES OF JUDGES.

Section 1. Errors of judgment. Judges of the superior courts of record are not liable to answer personally for acts done by them in a judicial capacity, or for errors of judgment. *Yates v. Lansing*, 5 Johns. 282; S. C., 9 *id.* 395; *Vanderheyden v. Young*, 11 *id.* 150; *Ounningham v. Bucklin*, 8 Cow. 178; and the English courts have decided it to be a principle of the common law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly. *Fray v. Blackburn*, 3 B. & S., Q. B. 576; *Thomas v. Churton*, 2 *id.* 475.

The same rule prevails in this country, in all the States. *Randall v. Brigham*, 7 Wall. 523; *Howe v. Mason*, 14 Iowa, 510; *Downing v. Herrick*, 47 Maine, 462; *Robbins v. Gorham*, 25 N. Y. (11 Smith) 538; 26 Barb. 586; *Evans v. Foster*, 1 N. H. 374; *Burnham v. Stevens*, 33 *id.* 247; *Ambler v. Church*, 1 Root, 211; *Pratt v. Gardner*, 2 Cush. 63; *Chickering v. Robinson*, 3 *id.* 543; *Raymond v. Bolles*, 11 *id.* 315.

Section 2. Exemption from censure and reproach. A judge, so constituted by proper authority, is legally protected against censure and reproach with respect to his ability, fitness for his place, etc., which, if allowed, would detract from the veneration for his person and prevent submission to his judgment; both of which are essential to the vigorous execution of the laws. All scandalous reflections on the judges of the superior courts of

Indictment or impeachment for corruption.

record in England are within the statute of *scandalum magnatum*. 2 Bac. Abr. 620.

There are no statutes in this State which give a judge any greater advantages than are possessed by any other citizen. When an attack is made which amounts to a contempt of court, ample authority exists for the due punishment of the offender. And if the publication is slanderous or libelous, the law gives ample protection by action. It is the duty of an attorney to abstain from all offensive personality, and to maintain the respect that is due to the court. To protect itself against a violation of those duties, as well as against a contempt of its authority, is a necessary incidental power of a court of justice, intrusted to it for the preservation of its respectability and independence. *Redman v. State*, 28 Ind. 205, 212; *State v. Tipton*, 1 Blackf. 166; *Brown v. Brown*, 4 Ind. 627.

Section 3. Indictment or impeachment for corruption. A judge cannot be challenged or excepted to for corruption; but must be punished by indictment or removed by impeachment. *McDowell v. Van Deusen*, 12 Johns. 356.

A judge who maliciously obstructs the course of justice is guilty of a misdemeanor. *Regina v. Marshall*, 4 Ell. & Bla. 480; *Ex parte Ramshay*, 18 Q. B. 173.

CHAPTER II.

OFFICERS OF COURTS.

ARTICLE I.

JUDGES.

Section 1. How judges acquire title to office. The judges of the English courts of record are appointed by commission of the crown; but in this State judges acquire title to office through the votes of the people. Article 6 of the State constitution (known as the amended judiciary article), and which took effect January 1, 1870, provides in section 2 that "there shall be a court of appeals composed of a chief judge and six associate judges, who shall be chosen by the electors of the State, and shall hold their office for the term of fourteen years.

It is further provided by section 13 of the same article, that "justices of the supreme court shall be chosen by the electors of their respective judicial districts."

Similar provisions are made in the same article for the choosing of the judges of the county courts by the electors of the respective counties, and of the judges of the courts of cities by the electors of the respective cities. §§ 13, 15.

Section 2. How assigned to special districts. The State is now divided into four judicial departments, in each of which, general terms of the supreme court are held annually, at certain designated times and places.

* The chief justice and his associates, who shall compose the general term in each department, are designated by the governor from the whole bench of justices composing the supreme court. The governor is, in like manner, empowered to fill vacancies in the general term as often as they shall occur for the unexpired terms. Laws of 1870, ch. 408, §§ 2, 3.

Section 3. How removed from office. Judges of the court of appeals and justices of the supreme court may be removed by concurrent resolution of both houses of the legislature, two-thirds of all the members elected to each house concurring. Judges of other superior courts of record may be removed by

Origin of office of attorney — Attorneys of early English courts.

the senate, on the recommendation of the governor, two-thirds of all the members elected to the senate concurring therein. Const., art. 6, § 11.

ARTICLE II.

ATTORNEY.

Section 1. Origin of the office of attorney. An attorney at law is "one who is put in the place, stead, or turn of another, to manage his matters of law" (3 Bl. Com. 25); or, according to a later definition, "he is an officer in a court of justice who is employed by a party in a cause to manage the same for him." Bouv. Dict.

The office of attorney is one of very early origin in the English law, though parties to a suit could not appear by attorney without the king's special warrant, by writ or letters patent till the statute of Westm. 11 (13 Edw. I), ch. 10, when this restriction was removed, and a general liberty given to parties, of appearing and prosecuting or defending their suits by attorney. 3 Bl. Com. 26. It was undoubtedly the practice, however, from the earliest period previous to the statute, to allow a party, after once appearing, to appoint an attorney to represent him during the subsequent progress of the cause. Steph. Pl. App., note 5.

Section 2. Attorneys of the early English courts. The first attorneys or advocates in the earlier English courts were the priests or monks, who alone in those rude times were competent to undertake a legal discussion. During the whole of the Anglo-Saxon, Danish, and Norman periods of the English history, literary and scientific acquirement was confined almost exclusively to the clergy, and the study of the law was by no means neglected by them. Some of the early bishops and other dignitaries of the church became eminent as jurists and courtiers, and the priests and monks were universally resorted to as the only persons capable of drawing up a legal instrument. After the Norman conquest, when causes were principally tried before judges appointed by the king, judicial offices were filled almost exclusively by ecclesiastics; and members of this body, till a much later period, following the example of their predecessors, sought and obtained considerable emoluments by embracing the

profession of advocates before the legal tribunals. 1 Spence's Eq. Juris. 14.

Section 3. Attorneys of modern English courts. Upon the withdrawal of the clergy from the temporal courts (early in the reign of King William III), the study and practice of the law was, of course, devolved upon laymen; but little seems to have been accomplished in the way of progress till the court of common pleas was fixed in one certain place. This event had the effect of bringing together the professors of the municipal law, who before were dispersed throughout the kingdom, and the inns of court and of chancery were established by them near the city of Westminster, the place of holding the king's courts. Here exercises were performed, lectures read, and degrees were at length conferred in the common, as at other universities in the canon and civil law. 1 Bl. Com. 23. The degrees conferred were those of barristers and serjeants. In the old books barristers are styled *apprenticii ad legem*, or apprentices; having been regarded merely as learners, and not qualified to execute the full office of an advocate till they were of sixteen years' standing. They seem to have been first appointed by an ordinance of King Edward I, in parliament, in the 20th year of his reign. Spell. Gloss. 37; 1 Bl. Com. 23, note; 3 id. 27. Barristers may be admitted serjeants-at-law after sixteen years' standing, and the degree of serjeant is the most honorable at common law. The judges of the courts of Westminster are always admitted into this venerable order before they are advanced to the bench; and none but serjeants were formerly permitted to practice in the courts of common pleas. This privilege, however, has since been extended to all barristers by statute 9 and 10 Vict., ch. 54; 3 Shars. Bl. Com. 27, note. The attorneys of the English courts are admitted to the execution of their office by the superior courts of law and equity, and are officers of the respective courts in which they are admitted to practice, and, as they have many privileges on account of their attendance there, so they are peculiarly subject to the censure and animadversion of the judges. 3 Broom & Had. 23.

In practice the term "attorney" is generally made use of in proceedings in common-law courts, and that of "solicitor" in the equity courts.

Section 4. The word "attorney" as used in this State. Previous to the constitution of 1846, the offices of attorney and counsel

The word "attorney" as used in this State — Admission of attorneys.

were separate in this State, and the duties attached to each were widely different. The peculiar duties of the latter as distinguished from that of the former, were to give counsel or legal advice in regard to the commencement, prosecution and defense of actions, superintend their progress, and conduct such of the proceedings as required a personal appearance and oral argument in open court. The former had no authority to act on such occasions. After three years' practice attorneys were entitled to be examined for the degree of counsel, and, if found qualified, were duly enrolled as such in accordance with the established rules of the supreme court. Under the Code both offices are blended together, and the same person may exercise the function of attorney and counsel under the same retainer. When separately employed, however, their functions and authority are still distinct. *Easton v. Smith*, 1 E. D. Smith, 318. Attorneys are considered, in all respects, as officers of the courts in which they severally practice; *Denton v. Noyes*, 6 Johns. 296, 316, note; and like counsel and other officers of the court, they are, by a legal fiction, always deemed to be, during term, present in court. *The People v. Nevins*, 1 Hill, 154.

Since the abolition of the court of chancery and the blending of the two systems of law and equity in this State, the term "solicitor," formerly applied to a practitioner in the court of chancery, has passed into disuse, and the term "attorney" is used in treating matters of equity as well as in law. Attorneys and counselors, when admitted, hold their offices for life, subject to removal or suspension for any deceit, malpractice or misdemeanor. 1 R. S. 109, §§ 23 to 25.

Section 5. Admission of attorneys. By the constitution of 1846 (art. 6, § 8), the profession was thrown open to any male citizen of good moral character, and who possesses the requisite qualifications of learning and ability — and the mode of admission is prescribed by the judiciary act of 1848, chapter 280, section 75. The mode of admission (which was to be made at general term), and the necessary examination, previous to admission, were further regulated by supreme court, rules 1 and 2. These rules, however, so far as they relate to the admission of attorneys, have been superseded or modified by the rules of the court of appeals, adopted under the authority of an act passed by the legislature April 13, 1871. *Laws of 1871*, ch. 486; *Wait's Code*, 818 to 821; *post*, 235 to 238.

Requisite qualifications under the rules.

In addition to the general statute provisions, and the rules of the courts made in pursuance of them, relating to the admission of attorneys, it is provided by a special act of the legislature that "any graduate of the law department of the university of Albany shall be admitted to practice as attorney and counselor at law in all the courts of the State. Laws of 1859, ch. 267, § 2. A similar act entitles any graduate of the law school of Columbia college to like admission. Laws of 1860, ch. 202, § 1.

The constitutionality of the provisions of the latter act was questioned in *Matter of the law graduates of the University of New York*, 31 Barb. 353; S. C., 19 How. 97; 10 Abb. 343. These cases, however, were reversed in the court of appeals and the constitutionality of the statute established. *Matter of application of Henry W. Cooper*, 22 N. Y. (8 Smith) 67; S. C., 20 How. 1; 11 Abb. 301. *

Section 6. Requisite qualifications under the rules. The necessity of prescribing rules, regulating the admission of attorneys to practice in our various courts, arises from the nature of the duties to be performed by them. These duties being of a very high character, and among the most responsible arising out of human affairs, require for their faithful performance the strictest integrity of character combined with ready skill as practitioners. In order to insure the requisite qualifications on the part of those intrusted with the performance of these duties, it has been provided that no person shall be admitted as an attorney of any court, unless he be *approved* by the court for his good character and learning. 2 R. S. 287, § 65; Laws of 1871, ch. 486, § 3. Pursuant to the provisions of the last-named act, the court of appeals have adopted the following rules:

1. No person shall be permitted to practice as an attorney, solicitor or counselor, in any court of record in this State, without a regular admission and license by the supreme court at a general term thereof. To obtain such admission and license, except in cases otherwise provided for by said act, the person applying must be examined under the direction of the court. The time for the examination of persons applying to be admitted shall be Thursday of the first week of each general term in the several departments. The examinations shall in all cases be public, and, unless conducted by the judges of the court, shall be by not less than three practicing lawyers of at least seven years' standing at the bar, to be appointed by the court.

Requisite qualifications under the rules.

2. To entitle an applicant to an examination he must prove to the court, that he is a citizen of the United States, and that he is twenty-one years of age and a resident of the department within which the application is made, and that he has not been examined in any other department for admission to practice and been refused admission and license within three months immediately preceding, which proof may be by his own affidavit of the facts; that he is a person of good moral character, by the certificate of the attorneys with whom he has passed his clerkship, but which certificate shall not be deemed conclusive evidence, and the court must be satisfied on this point after a full examination and inquiry, that he has served the clerkship or pursued the substituted course of study prescribed by the rules, as requisite to an examination. The clerkship may be proved by the certificate of the attorneys with whom the same was served, or, in case of their death or removal from the State, by such other evidence as shall be satisfactory to the court.

The proof of any time of study, allowed as a substitute for any part of the clerkship required by these rules, shall be by the certificate of the teacher or president of the faculty, under whose instructions the person has studied, together with the affidavit of the applicant; the proof must be satisfactory to the presiding judge of the court, who alone shall make the order allowing a deduction from the regular term of clerkship by reason of such studies.

3. No person shall be admitted to examination as an attorney, solicitor or counselor, unless he shall have served a regular clerkship of three years in the office of a practicing attorney of the supreme court after the age of seventeen years.

4. It shall be the duty of the attorney with whom the clerkship shall be commenced, to file a certificate in the office of the clerk of the court of appeals, certifying that the person has commenced a clerkship with him, and the clerkship shall be deemed to have commenced on the day of the filing of the certificate. A copy of the certificate, certified by the clerk of the court of appeals, with the date of the filing thereof, shall be produced to the court at the time of an application for examination.

5. When a clerkship has already commenced, or shall have commenced before these rules shall take effect, the certificate required by the preceding rule, verified by the affidavit of the

Requisite qualifications under the rules.

attorney, stating the time of the actual commencement of such clerkship, may be filed at any time before the first day of November next.

6. It shall be the duty of an attorney to give to a clerk, when he shall leave his office, a certificate stating his moral character, the time of clerkship which he has passed with him, and the period which has been allowed him for vacation. Not more than three months shall be allowed for vacations in any year.

The term of clerkship will be computed by the calendar year, and any person applying for admission, whose period of clerkship shall expire during the term at which the application shall be made, will be admitted to examination at the customary day of the same term.

7. Any portion of time, not exceeding one year, actually spent in regular attendance upon the law lectures in the university of New York, Cambridge university, or the law school connected with Yale college, or a law school connected with any college or university of this State, having a department organized with competent professors and teachers, in which instruction in the science of law is regularly given, shall be allowed in lieu of an equal period of clerkship in the office of a practicing attorney of the supreme court.

8. Persons who have been admitted, and have practiced three years as attorneys in the highest court of law in, another State, may be admitted without examination to practice as attorneys, solicitors and counselors in the courts of this State. But such persons must have become residents of this State before applying for admission, and must bring a letter of recommendation from one of the judges of the highest court of law in the State from which they came.

These rules of the court of appeals were adopted May 1, 1871, and it was provided by an additional rule (9), that they should take effect on the first day of June, 1871. Soon after their adoption the following amendments were made, whereby their operation was suspended until June 1, 1872: "As to persons who had been, during one year or more, immediately preceding the first day of May, 1871, engaged in the study of the law in the office of a practicing lawyer, or in any law school, or in the law department of any college or university, with the view of applying for admission to practice in the courts of this State," and providing "that the graduates of the university of the city of

 Qualifications for actual practice.

New York, who shall have commenced their course of study in the law department of that university, at any time prior to May 1, 1872, shall, on complying with the requirements of chapter 187 of the laws of 1860, be entitled to admission upon the examination and in the manner provided in that act." See rules of the court of appeals, under act of April 13, 1871, relating to admission of attorneys.

Section 7. Qualifications for actual practice. However proper and important it may be to prescribe rules for the admission of attorneys, and however strictly a compliance with them may be enforced upon applicants for examination, it should still be remembered that a mere literal compliance with the requirements of any set of rules, however stringent, will qualify no one for the arduous duties of actual practice.

A student need not expect to become qualified for admission to practice by a few months' casual and superficial reading. He must understand the old system before he can practice the new. He must master Blackstone, Cruise, Kent, Sugden, Comyn, Chitty, Starkie, Greenleaf, Story, and the provisions of the Revised Statutes, before he can begin to peruse the Code with advantage. *Matter of Pratt*, 13 How. 1, 3.

A legal mind, thoroughly trained and disciplined by a preparatory course of study, and deeply imbued with a love for the profession, must be brought to the study of common-law and equity principles, a thorough knowledge of which is essential to a correct understanding of the rules of practice founded on them, for, as Blackstone truly remarks, "if practice be the whole the student is taught, practice must also be the whole he will ever know; if he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him; he must never aspire to form, and seldom expect to comprehend, any arguments drawn, *a priori*, from the spirit of the laws and the natural foundations of justice." 1 Bl. Com. 32. It is also important that a practitioner should be familiar with the common-law and the equity practice. Many of their rules are still applicable under the Code; and a knowledge of those that have even become entirely obsolete under our present practice serves to throw much light on the proceedings adopted in their stead.

The endless variety of causes out of which litigation is con-

Duty of attorney to his client.

stantly arising, demanding the services of skilled attorneys, renders a knowledge of the world — its men, and business, customs and usages — an essential qualification; but one that can be acquired only by close observation and extended experience. Every species of knowledge may be made subservient to the purposes of the practicing attorney, and all who seek to enter the profession should be indefatigable in its acquisition. "They must pry into the secret recesses of the human heart, and become well acquainted with the whole moral world, that they may discover the abstract reason of all laws; and they must trace the laws of particular States, especially of their own, from the first rough sketches to the more perfect draughts; from the first causes or occasions that produced them, through all the effects, good and bad, that they produced." Lord Bolingbroke, *Stud. of Hist.*, 353.

Section 8. Duty of attorney to his client. These duties, at the present day, are of a far more complicated and responsible nature than those which attached to the office of an attorney in the earlier courts, after which ours are generally modeled, and hence a higher degree of professional skill and honesty is required on the part of those intrusted with them.

An attorney, though an officer of the court, cannot generally be compelled to appear or act for any one unless he have undertaken so to do, or accepted a retainer, but in some cases, as where a party sues in *forma pauperis*, an attorney may be compelled by the court to act without fee or reward. 2 R. S. 444, 445. Although not absolutely necessary that the appointment or retainer of an attorney should be in writing, in most cases it is advisable; being better for the attorney, because he avoids all difficulty in proving his retainer; and it is better for many clients, as it puts them on their guard and prevents them from being drawn into law suits without their own express direction. *Owen v. Ord*, 3 Carr. & P. 349. In general, the authority of an attorney is presumed, and the adverse party having no notice to the contrary may act on that presumption. *Hamilton v. Wright*, 37 N. Y. (10 Tiff.) 502; S. C., 5 Trans. App. 1; *Brown v. Nichols*, 42 N. Y. (3 Hand) 26; 9 Abb. N. S. 1; *Foote v. Lathrop*, 41 N. Y. (2 Hand) 358. When called in question, the authority of an attorney is to be determined by the court. *Commissioners v. Purdy*, 36 Barb. 266; S. C., 22 How. 506; 13 Abb. 434. An attorney commencing a suit in

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ejectment must first obtain the written authority of the plaintiff to do so. *Bank v. Conklin*, 2 How. 7. See 2 R. S. 305, 306; *Harris v. Mason*, 10 Wend. 568; *Howard v. Howard*, 11 How. 80.

The relation of attorney and client being of a highly confidential nature, all communications passing between them, respecting the subject of the attorney's professional employment, are privileged, and he cannot be compelled, nor will he be allowed, to disclose them. *Bank of Utica v. Mersereau*, 3 Barb. Ch. 595; *Williams v. Fitch*, 18 N. Y. (4 Smith) 546; *Clark v. Richards*, 3 E. D. Smith, 89; and this same privilege extends to similar communications between the attorney's clerk and such client. *Sibley v. Waffle*, 16 N. Y. (2 Smith) 180. A statement, however, made to an attorney, is no more privileged than one made to any other person, unless it is made for the purpose of obtaining professional advice on the subject of such statement. *Marsh v. Howe*, 36 Barb. 649. Neither will the privilege be sustained, where there appears to be a combination between the attorney and client for the purpose of withholding important evidence. *People v. Sheriff of New York*, 29 Barb. 622; S. C., 7 Abb. 96.

If an attorney has an interest in the facts communicated to him, and a disclosure becomes necessary to protect his own personal rights, he is no longer bound by the obligation of professional secrecy. *Rochester City Bank v. Suydam*, 5 How. 254; S. C., 3 Code R. 249.

On being retained in a case it becomes the duty of the attorney to make all needful preparation for the trial of it. To this end, a correct statement of the facts should be obtained from an examination of the various papers and documents in the cause, and by a personal communication with the client, and by examination of the witnesses and proofs. *Thwaites v. Mackerson*, 3 Carr. & P. 341; *Hopkinson v. Smith*, 7 Moore, 237; S. C., 1 Bing. 13; *Harvey v. Mount*, 8 Beav. Ch. 439. In the further preparation for trial the attorney should prepare briefs of the pleadings, proofs, and observations; procure the production of the requisite documents, and subpoena the requisite witnesses. *De Rouffigny v. Peale*, 3 Taunt. 484; *Reece v. Righy*, 4 B. & Ald. 202. When an attorney is employed it is on him that all notices should be served, and not on the client, who cannot be supposed to know their effect, and service on the client will generally be deemed irregular and of no effect. Code, § 417; *Wardell v.*

General scope and duration of authority of attorney.

Eden, 2 Johns. Cas. 121; *Bogardus v. Livingston*, 7 Abb. 428; S. C., 2 Hilt. 236; *Tripp v. De Bow*, 5 How. 114; S. C., 3 Code R. 163; *Miller v. Miller*, 37 How. 3. And in the course of a suit, the practice of the courts require a great number of facts and proceedings to be proved by affidavit, which the attorney in the cause, or his managing clerk, can, generally speaking, only make. For these reasons, the courts require that the attorney shall always be at his office, or have some competent person there during office hours. An attorney's clerk during the absence of the attorney represents him as to all the ordinary business of the office. *Power v. Kent*, 1 Cow. 211. And the service of a notice is sufficient if made on him. *Anonymous*, 1 Caines, 73; *Chapman v. Raymond*, 8 Johns. 360.

An attorney who undertakes the conduct of an action impliedly stipulates to carry it to its termination, and he is not at liberty to abandon it without reasonable cause and reasonable notice. *Harris v. Osbourn*, 2 Crompt. & Mees. 629; 4 Tyrw. 445; *Whitehead v. Lord*, 7 Exch. 691; S. C., 11 Eng. L. & Eq. 587. And if he wrongfully refuse to proceed, and break his contract in this respect, he will be liable to an action for it. *Hoby v. Buitt*, 3 B. & Ad. 350.

Section 9. General scope and duration of the authority of an attorney. The attorney's authority is two-fold, viz., expressed in the warrant or implied by law. Co. Litt. 52. Besides having the conduct of the more formal proceedings, an attorney has a right to exercise his discretion in all the ordinary occurrences which take place in relation to a cause. He may make stipulations, waive technical advantages, and generally assume control of the action. *Gorham v. Gale*, 7 Cow. 739; *Walradt v. Maynard*, 3 Barb. 584; *Steward v. Biddlecum*, 2 N. Y. (2 Comst.) 103. And a client has no right to control him in the due and orderly conduct of a suit. *Anonymous*, 1 Wend. 108; *Read v. French*, 28 N. Y. (1 Tiff.) 285. Under the general authority of an attorney he may discontinue the cause (*Gaillard v. Smart*, 6 Cow. 385); commence a second action after being nonsuited in the first for want of proof (*Scott v. Elmendorf*, 12 Johns. 317); waive a judgment by default (*Latuch v. Pasherante*, 1 Salk. 86; *Anonymous*, 1 Wend. 108), and direct the sheriff as to the time and manner of enforcing an execution. *Gorham v. Gale*, 7 Cow. 739; *Corning v. Southland*, 3 Hill, 552. An attorney cannot settle a suit and conclude the client in relation to the subject in

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litigation without special authority. *Shaw v. Kidder*, 2 How. 244; *East River Bank v. Kennedy*, 9 Bosw. 543. Neither can he recover of his client fees of counsel associated with him, without proving that he employed such counsel at the client's request, or with his sanction paid such fees. *Cook v. Ritter*, 4 E. D. Smith, 253.

In general, an attorney, once appointed, is vested with all necessary authority for the management of the case intrusted to him, and for carrying into effect the orders and judgments of the court. If he enters into stipulations pertinent to the matter intrusted to him, he can thereby bind his client. If, in such matters, he acts without special authority, the court will still enforce his acts against his client in the particular business of his employment. If, in so doing, his client is seriously damaged, and he is unable to respond in damages, the court will relieve the party injured, preserving the other party from loss. *People v. Mayor, etc., of New York*, 11 Abb. 66. Under a general retainer the authority of the attorney ceases when the suit is brought to a final judgment. *Walradt v. Maynard*, 3 Barb. 584; *Adams v. Fort Plain Bank*, 23 How. 45. See S. C., 2 Trans. App. 234; 36 N. Y. (9 Tiff.) 255; *Mygatt v. Willcox*, 1 Lans. 55. His authority is also terminated by the death of his client, and he is in no sense the attorney of the successors in interest. *Putnam v. Van Buren*, 7 How. 31. Until changed, the authority of the attorney continues on a writ of error or appeal, and service must be made on him and not on the party. *Adams v. Fort Plain Bank*, 23 How. 45; Rule 4, Court of Appeals.

Section 10. Responsibility of attorney to client. An attorney is bound to exercise a competent degree of care, skill and fidelity in the discharge of his professional duties, and the law will hold him strictly responsible to his client for any detriment or losses arising from the want of these qualifications. An attorney is liable for gross blunders and negligence in the management of the business with which he is intrusted, for "every person who enters a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill." *Lanphier v. Phipos*, 8 Carr. & P. 479. The exact degree of skill required is not easily determined; but, in general, "the cases appear to establish that he is liable for the consequences of ignorance or non-observance of the rules of practice of the court, for the want of care in the preparation of the cause for trial or of attendance

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thereon with his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession; while, on the other hand, he is not answerable for error in judgment upon points of new occurrence or of nice or doubtful construction." *Godefroy v. Dalton*, 6 Bing. 468. And where he acts in good faith, and to the best of his skill and knowledge, he will be protected. *Gilbert v. Williams*, 8 Mass. 51. When, however, an attorney disobeys the lawful instructions of his client, and a loss ensues, for that loss the attorney is responsible. *Ib. Cox v. Livingston*, 2 Watts & Serg. 103; *Wilcox v. Plummer's Exrs.*, 4 Peters, 172. But it is a fair presumption that he acts according to the instructions of his client, unless in a case of such gross negligence that a violation may be inferred. *Holmes v. Peck*, 1 R. I. 242.

An attorney cannot serve, professionally, both parties to a controversy, and any unfaithful dealing with his client will deprive him of all right to compensation for his services. *Herrick v. Catley*, 1 Daly, 512; S. C., 30 How. 208; *Currie v. Cowles*, 6 Bosw. 452.

The appearance of an attorney without authority has been held to be a nullity (*Bean v. Mather*, 1 Daly, 440); and for such gross violation of duty he is liable to be disgraced and punished. *Brown v. Nichols*, 42 N. Y. (3 Hand) 26; 9 Abb. N. S. 1. If, however, a defendant is regularly brought into court, and an attorney of the court appears for him, his acts are binding upon the party, until the attorney is superseded, unless collusion is shown, and the remedy of the party is against the attorney for acting without authority. *Hamilton v. Wright*, 37 N. Y. (10 Tiff.) 502; 5 Trans. App. 1; *Blodget v. Conklin*, 9 How. 442.

The court has power to relieve a party to an action from a judgment or order obtained against him by reason of the negligence, ignorance or fraud of his attorney. *Sharp v. Mayor, etc., of New York*, 31 Barb. 578; S. C., 19 How. 193; affirming S. C., 9 Abb. 426; 18 How. 213; *Elston v. Schilling*, 7 Rob. 74; *Quinn v. Lloyd*, id. 538; S. C., 36 How. 378; 5 Abb. N. S. 281. See *Bean v. Mather*, 1 Daly, 440.

Section 11. Attorney amenable to court for misconduct. The attorney is an officer of the court, and the court will exercise a supervision over the conduct of its officer, and insist upon his just and fair dealing with his client. *Brotherson v. Consalus*, 26 How. 213; *Brock v. Barnes*, 40 Barb. 521; *Nesbit v. Lock-*

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man, 34 N. Y. (7 Tiff.) 167; *Hitchings v. Van Brunt*, 5 Abb. N. S. 272; S. C., 38 N. Y. (11 Tiff.) 335. And in the exercise of this supervision will not suffer an attorney to misuse the process of the court. *The 99 Plaintiffs v. Vanderbilt*, 1 Abb. 193; S. C., 4 Duer, 632; 10 How. 324; *Commissioners of Excise of New York v. Purdy*, 36 Barb. 266; S. C., 22 How. 312, 506; 13 Abb. 434. An attorney who has received money for his client must pay it over at once or an attachment will lie against him; and this rule extends to moneys placed in his hands, in his professional character, for investment, as well as to moneys received by him in a suit or other legal proceeding. *Barry v. Whitney*, 3 Sandf. 696; S. C., 1 Code R. N. S. 101; *In re Grant v. Chester*, 17 How. 260; S. C., 8 Abb. 357.

The punishments to which attorneys are subject for misconduct are removal from office, fine and imprisonment; besides being liable for damages at the suit of the party aggrieved. 2 R. S. 287, 288. In minor cases of misconduct the court will generally be satisfied with making the attorney pay the costs incurred by the parties by reason of such misconduct. *People v. Bradt*, 6 Johns. 318; *Waring v. Baret*, 2 Cow. 460; *Boyce v. Bates*, 8 How. 495.

Attorneys are prohibited by statute from buying any bond, bill, note, book-debt, or thing in action, with the intent and for the purpose of bringing a suit thereon. 2 R. S. 288, § 71. The provisions of the above statute do not, however, apply to judgments. *Brotherson v. Consalus*, 26 How. 213. Attorneys, both at common law and under the Code, are disqualified from becoming bail, and the disqualification extends even to their clerks. *Wheeler v. Wilcox*, 7 Abb. 73; *Miles v. Clarke*, 4 Bosw. 632; affirming S. C., 2 id. 709; *Craig v. Scott*, 1 Wend. 35; *Coster v. Watson*, 15 Johns. 535; *King v. Sheriff of Surrey*, 2 East, 181; *Laing v. Cundale*, 1 H. Bl. 76. By rule 8 of the supreme court, attorneys are prohibited from being sureties in any undertaking.

In an action brought by an attorney to recover for professional services, the defendant may show that the services were rendered worthless by the attorney's ignorance or negligence. *Bowman v. Tullman*, 40 How. 1; *Bracey v. Carter*, 12 Ad. & E. 373. See *Runyan v. Nichols*, 11 Johns. 547; *Hopping v. Quin*, 12 Wend. 517. On the other hand, the attorney or counsel does not guaranty the success of the suit, or the soundness of his

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opinions, or that they will ultimately be sustained on appeal. *Bowman v. Tallman*, 27 How. 212; 2 Rob. 385; S. C. affirmed, 40 How. 1; 41 N. Y. (2 Hand) 619(n).

Section 12. Liability to adverse party. For the purpose of encouraging freedom of speech in the maintenance of an action, or in the lawful defense of their clients, the law does not hold an attorney answerable for any matter spoken by him, pertinent to the case in hand, and suggested in his client's instructions, although it should reflect upon another and even prove absolutely groundless. But, if he maliciously invents and mentions an untruth, not pertinent to the cause, he may be liable to an action at suit of the party injured. 3 Broom & Had. 25; *Hodgson v. Scarlett*, 1 B. & Ald. 232; *Mackay v. Ford*, 5 H. & N. 792.

It is also the settled doctrine of the courts of this State, that words spoken or written in a judicial proceeding by any person (attorney or party) having a duty to discharge, or an interest to protect in respect to such proceedings, are *absolutely privileged*; and no action will lie for such speaking or writing, however false, defamatory or malicious may be the words, provided the matter was material to the issue or inquiry before the court. *Marsh v. Elsworth*, 36 How. 532; S. C., 1 Sweeny, 52; *Warner v. Paine*, 2 Sandf. 195; *Garr v. Selden*, 4 N. Y. (4 Comst.) 91; 9 N. Y. Leg. Obs. 137; *Hastings v. Lusk*, 22 Wend. 410; *Gilbert v. The People*, 1 Denio, 41.

Section 13. Compensation of attorney. By the English common law an attorney can maintain no action for his fees, which, in England, are given not as a salary or hire, but as a mere gratuity, which a counselor cannot demand without injuring his reputation. 3 Bl. Com. 28. The notion, however, that an attorney's fees are merely honorary has never been recognized in this State; and an attorney is entitled to recover a reasonable compensation for his services. *Cagger v. Adams*, 23 Wend. 57; S. C. affirmed, 26 id. 451; *In re Paschal*, 10 Wall. 483, and cases there cited.

By the adoption of the Code all statutes establishing or regulating the costs or fees of attorneys in civil actions, and all the rules and provisions of law, restricting or controlling the right of a party to agree with an attorney, for his compensation, were repealed; and it was provided, that hereafter the measure of compensation shall be left to the agreement, express or implied, of the parties. But there may be allowed to the prevailing

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party, upon the judgment, certain sums, by way of indemnity for his expenses in the action, which allowances are in this act termed "costs." Code, § 303.

These allowances termed "costs," as taxed by the clerk under the Code, are no longer the measure of compensation, and proof of the value of the attorney's services is required. In the absence of an express agreement between the attorney and client, he is entitled to such compensation as his services are reasonably worth. *Garr v. Mairat*, 1 Hilt. 498; *Moore v. Westervelt*, 3 Sandf. 762; S. C., 1 Code R. N. S. 131; *Bartle v. Gilman*, 18 N. Y. (4 Smith) 260; S. C., 17 How. 1.

But the law will not presume an agreement to allow to the attorney what the statute gives to a party as his compensation. *Stow v. Hamlin*, 11 How. 452. The old law of champerty being wholly obsolete in this State, with the single exception respecting titles to land, still retained in the Revised Statutes (2 R. S. 691), attorneys may now (except in actions for land) legally stipulate with their clients for a share of the proceeds of actions brought by them, as a compensation for their services. *Sedgwick v. Stanton*, 14 N. Y. (4 Kern.) 289; *Durgin v. Ireland*, id. 322; *Satterlee v. Frazer*, 2 Sandf. 141; *Benedict v. Stuart*, 23 Barb. 420; *Voorhees v. Dorr*, 51 id. 580. Notwithstanding the liberal provisions under the Code respecting the agreements between attorneys and clients, as to the compensation of the former, the court will carefully scrutinize all such contracts, and guard the client's rights against every attempt by the attorney to secure an advantage to himself at the expense of the client. *Brotherson v. Consalus*, 26 How. 213; *Barry v. Whitney*, 3 Sandf. 696; S. C., 1 Code R. N. S. 101. Thus, an agreement of this nature, where the attorney is promised large compensation, is regarded with great suspicion by the court, and in case the meaning of the instrument is not clearly obvious, the client is entitled to the most favorable construction of which it is susceptible. *Hitchings v. Van Brunt*, 5 Abb. N. S. 272; S. C., 38 N. Y. (11 Tiff.) 335; and it is still illegal for the attorney to contract with his client, that he will carry on the suit at his own expense, and be himself responsible for the costs. *Brotherson v. Consalus*, 26 How. 213; *Fish v. Fish*, 39 Barb. 513.

Section 14. Attorney's lien for costs. The attorney's lien for his costs has not been affected by the Code, but still exists as formerly. *Ward v. Wordsworth*, 1 E. D. Smith, 598; S. C., 9

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How. 16; reversing S. C., 1 Code R. N. S. 208; 9 N. Y. Leg. Obs. 313; *Rooney v. Second Avenue Railroad Co.*, 18 N. Y. (4 Smith) 368. An attorney has a lien for his costs upon all deeds and papers in his hands belonging to his client, and until he is paid or otherwise satisfied, the court will not order them to be given up. *Hughes v. Mayre*, 3 T. R. 275; *Howell v. Harding*, 8 East, 362. From the peculiar nature of the services in which attorneys are retained, their lien is allowed to attach on the fruits of a judgment or decree obtained through those services. *In re Paschal*, 10 Wall. 483; *Ex parte Price*, 2 Ves. Sr. 407; *Turwin v. Gibson*, 3 Atk. 720; *Mitchell v. Oldfield*, 4 T. R. 123; *Read v. Dupper*, 6 id. 361; also on the money payable to the client thereunder. *Tabram v. Horn, M. & R.* 228; *Omerod v. Tqte*, 1 East, 464.

The attorney has a lien for his fees in an action, even for the recovery of unliquidated damages. *Rasquin v. Knickerbocker Stage Co.*, 12 Abb. 324; S. C., 21 How. 293. And it extends not only to the taxable costs, but to the whole amount of compensation agreed upon between the attorney and his client. *Fox v. Fox*, 24 How. 409; *Hall v. Ayer*, 19 id. 91; 9 Abb. 220; *Ackerman v. Ackerman*, 14 id. 229. This lien, except as to costs, does not extend to the client's money or damages recovered, before the same is in the possession of the attorney. *St. John v. Diefendorf*, 12 Wend. 261.

An assignment of his claim by an attorney to a third party extinguishes his lien, and a re-assignment to the attorney will not revive it. *Chappell v. Dann*, 21 Barb. 17.

Where the judgment is satisfied by payment to the judgment creditor, it is valid against the lien of the attorney, unless the attorney has given notice to the debtor of his claim by way of lien to a portion of such judgment. *Ackerman v. Ackerman*, 14 Abb. 229; reversing S. C., 11 id. 256. See, also, *McDowell v. Second Avenue Railroad Co.*, 4 Bosw. 670; *Pearl v. Robitchek*, 2 Daly, 138. But, where a settlement is privately effected between the parties, with the design of preventing the attorney from obtaining his costs, the court will, notwithstanding the settlement, allow the attorney to go on and collect the costs in the action in order that he may thereby secure himself. *Rasquin v. Knickerbocker Stage Co.*, 21 How. 293; S. C., 12 Abb. 324; *People v. Hardenburgh*, 8 Johns. 335; *Robbins v. Alexander*, 11 How. 100.

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The papers on which an attorney asserts a lien for his claim must be given up on an offer by the client to give security for the amount shown to be due. *Cunningham v. Widing*, 5 Abb. 413; *In re Paschal*, 10 Wall. 483. And the acceptance of any security for the claim suspends the lien. *Cowell v. Simpson*, 16 Ves. 275. The acceptance of a note in payment has the same effect, and the attorney cannot retain the client's property as security for the payment of the note. *Lambert v. Buckmaster*, 2 Barn. & Cr. 616. If any property of the client, however, remains in the possession of the attorney, at the time the note is dishonored, his lien thereon will be revived. *Davies v. Lowndes*, 3 C. B. 808; *Stevenson v. Blakelock*, 1 M. & S. 535.

Section 15. Change of attorney. The authority of an attorney like that of any other agent may be revoked. *Walcott, Youchee*, 3 Bing. 423. And the courts will, on due proof of the client's authority, make an order to change the attorney at any stage of a cause, except where the rights of others would be affected by the revocation of the attorney's authority. *Davies v. Lowndes*, 3 C. B. 808. But, if the client is not acquainted with the English language, it must clearly appear by the affidavits or papers that such client understood and consented to such change, or the order will not be made. *Ib.* A party in an action cannot change his attorney without the leave of the court. *McPherson v. Rorinson*, 1 Doug. 217; *Twort v. Dayrell*, 13 Ves. Jr. 196; *Mumford v. Murray*, Hopk. 369. And the court in granting a change will consult the rights of the attorney, and see that his just claims for his services are first discharged or secured. *Hoffman v. Van Nostrand*, 14 Abb. 336; *In re Paschal*, 10 Wall. 483.

By a rule of the supreme court it is provided, that "an attorney may be changed by consent, or upon cause shown, and upon such terms as shall be just upon the application of the client; by the order of a justice of the court and not otherwise." Rule 15.

Where attorneys are changed in an action the lien of the former attorney on the papers of the client for whatever sum is due will be preserved. *Hazlett v. Gill*, 5 Rob. 611; *In re Paschal*, 10 Wall. 483. And until the order of substitution is regularly entered, and notice served on the adverse party, such party will be justified in treating only with the attorney who first appeared in the action. *Parker v. City of Williamsburgh*,

Striking name from roll of attorneys.

13 How. 250; *Robinson v. McClellan*, 1 id. 90. Service upon the adverse party of notice of substitution is sufficient; the order need not be served. *Bogardus v. Richtmeyer*, 3 Abb. 179; *Dorlon v. Lewis*, 7 How. 132.

Section 16. Striking name from roll of attorneys. In addition to the penalties already noticed (*ante*, 243), to which attorneys may become liable by misconduct in office, they are also liable in some cases of gross misconduct to have their names stricken from the roll of attorneys. Thus, where it satisfactorily appears that no reliance can be placed upon the word or oath of an attorney, he is manifestly disqualified for the office, and it is the duty of the court to strike the name of the party from the roll of attorneys. *Matter of Percy*, 36 N. Y. (9 Tiff.) 651; S. C., 3 Trans. App. 74.

The proper course of proceeding in such cases is, to present the evidence of the facts relied on to the court, which will direct a rule to show cause to be entered if a case proper for the action of the court be presented. *Anonymous*, 22 Wend. 656; *In re Peterson*, 3 Paige, 510. See 1 R. S. 109, § 24; Laws 1871, ch. 486, § 3.

Section 17. Re-instating attorney. Striking an attorney's name off the roll is not always understood to be a perpetual disability, and in some instances the courts have permitted him to be restored, considering the punishment in the light of a suspension only. *The King v. Greenwood*, 1 Wm. Bla. 222; 1 Tidd's Pr. 89.

ARTICLE III.

SHERIFFS.

Section 1. How sheriff acquires title to office. The sheriff is an executive officer of the different courts of justice, chosen by the electors in the respective counties of the State, once in every three years, subject to removal by the governor for cause shown. Const. of 1846, art. 10, § 1. During the term for which he is elected, he is incapacitated from holding other offices; and is ineligible for re-election as sheriff, during three years, after his term of office, as such, expires. 1 R. S. 112, § 48. In case of his removal from office or death, the governor may supply the vacancy until the next election. 1 R. S. 123, § 43; id. 124, § 49.

Section 2. General nature of the office. In his ministerial capacity it is the duty of the sheriff to execute and enforce the

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various orders and processes issued by the courts of record, summon juries for the trial of causes within the jurisdiction of such courts, and upon the determination of a cause he must see the judgment of the court carried into execution. To him is committed the custody of the jails within his county, and of the prisoners confined therein. 1 R. S. 380, § 75.

In this State the sheriff can scarcely be regarded as a judicial officer, being unauthorized to hold any court for any purpose whatever, except to execute writs of inquiry, and such special writs as may be directed to him, pursuant to any statute, and in the cases provided by law to inquire into any claim to property seized or levied upon by him. 2 R. S. 286, § 58.

The sheriff of every county is required to keep an office in some proper place, in the city or village in which the county courts are held, of which he must file a notice in the office of the clerk of the county, such office to be kept open for the transaction of business, during the hours and on the days prescribed by statute in relation to clerk's offices. 2 R. S. 285, §§ 54, 55.

Section 3. Coroners. In case of a vacancy in the office of sheriff, and if there be no under-sheriff, it is the duty of the county judge to appoint one of the coroners to execute the office until a new sheriff shall have qualified. 1 R. S. 380, § 78. And a coroner is also empowered to act in this capacity in cases where the sheriff is disqualified by reason of being a party to the proceedings. 2 R. S. 441, § 84.

The duties and liabilities of a coroner thus acting as sheriff are the same as those of the latter officer, except, if he be required to arrest the sheriff, he may confine him in any house other than that of the sheriff, or the county jail, and if he arrest any person at the suit of the sheriff he may commit such person to the county jail, and will then not be responsible for an escape. 2 R. S. 442, §§ 84, 87, 92.

Section 4. Deputies. A sheriff is bound to appoint an under-sheriff, who holds during his pleasure, and succeeds to all the powers and duties of the sheriff during his absence, disability, etc., but for ordinary purposes, the powers of the under-sheriff are the same as those of any deputy. 1 R. S. 379, §§ 71, 72.

He may appoint as many deputies as he pleases, and he and the under-sheriff may also depute persons to do particular acts. 1 R. S. 379, §§ 73, 74. The sheriff is liable in civil actions for all the acts of his deputies, done in the usual course of their busi-

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ness as deputies, prescribed by law, even including their acts of willful misconduct. *People v. Schuyler*, 4 N. Y. (4 Comst.) 181; *Pond v. Leman*, 45 Barb. 152; *Sanderson v. Baker*, 2 Wm. Bla. 832; *Woodgate v. Knatchbull*, 2 T. R. 154.

Section 5. Elisors. In case both sheriff and coroner be parties to a suit, or if an attachment issue against the coroner for not returning process, or not attaching the sheriff, the process of the court must issue to persons specially appointed by the court, and styled elisors. *People v. Palmer*, 1 Cow. 32; *Regina v. Sheriff of Glamorgan*, 1 Dowl. N. S. 308; *Mayor of Norwich v. Gill*, 1 Dowl. P. C. 246; *Andrews v. Sharp*, 2 Wm. Bla. 911.

Section 6. Disabilities of sheriffs. No sheriff, under-sheriff, deputy-sheriff, sheriff's clerk, or coroner, shall, during his continuance in office, practice as an attorney in any court of law or equity in this State. 1 R. S. 109, § 27. A sheriff and his deputies, or any other officer concerned in the process of the court, are also disqualified for becoming bail for any party in an action. *Bailey v. Warden*, 20 Johns. 129; *Bolland v. Pritchard*, 2 Wm. Bla. 799; *Daly v. Brooshoft*, 2 Brod. & Bing. 359; and neither can a sheriff nor deputy-sheriff execute final process in his own favor. *Mills v. Young*, 23 Wend. 315; *Carpenter v. Stillwell*, 11 N.Y. (1 Kern.) 61; or purchase any property whatever, directly or indirectly, at any sale conducted by said sheriff or deputy, under an execution directed to, or held by, either of them; and all such purchases are void. 2 R. S. 370, § 41.

No sheriff or other officer is permitted to take any bond, obligation or security, by color of his office, in any other case or manner than such as are provided by law; and any such bond, etc., taken contrary to this provision shall be void. 2 R. S. 286, § 59; *People v. Meighan*, 1 Hill, 298; *Bank of Buffalo v. Boughton*, 21 Wend. 58.

Section 8. Liabilities of sheriffs. The sheriff, before entering upon the duties of his office, must execute an official bond for the due discharge of his duties, in the penalty of \$20,000 in the city of New York, and \$10,000 in other counties. 1 R. S. 378, §§ 67, 68.

In the execution of process directed to him, the sheriff acts on his own responsibility, and is bound to exercise the utmost diligence. *Bowie v. Brahe*, 2 Abb. 161. He is entitled, however, to the ordinary presumption in favor of the proper performance of his official duties (*Smith v. Hill*, 22 Barb. 656); and is not

How clerks acquire title to office — Their duties.

responsible for acts done by him within the limits of his authority, when acting under process regular on its face. *Cross v. Phelps*, 16 Barb. 502; *Landt v. Hilts*, 19 id. 283.

ARTICLE IV.

CLERKS.

Section 1. How clerks acquire title to office. Clerks, like sheriffs, are elective officers, chosen by the electors of the respective counties for the term of three years, subject to removal by the governor, who is also empowered to fill any vacancy that may occur in the office, by an appointment, until the next election. Const., art. 10; 1 R. S. 124, § 49. The court of appeals appoints its own clerk, and also possesses the power of removal. Const., art. 6, § 2. Clerks of the several counties are clerks of the supreme court. Const., art. 6, § 20. See Code, § 466.

Section 2. General nature and duties of the office. These officers are intrusted with a very important class of duties, the due performance of which constitutes an essential feature in the proceedings connected with the administration of justice in our courts of record. In general, they have the custody of the seals of their respective courts, and they are authorized to impress such seal upon all writs and process which the law requires them to seal in actions and other proceedings; and all pleadings, affidavits, rules, records, etc., are required to be filed or entered in their offices. During term, it is their duty to attend court, take minutes of its proceedings, administer oaths when necessary, and to enter all special rules, orders and judgments made by the court. 1 P. & Du. Prac. 169. Under the Code numerous duties are imposed upon the clerk of the court, partaking partly of a judicial nature; thus, on the entry of judgment by default, in an action on contract for the recovery of money only, he assesses the amount of that recovery. Code, § 246, sub. 1. He enters up judgment upon a confession, or upon an offer if accepted (Code, §§ 384, 385), and is charged with the computation of interest and the adjustment of costs upon the entry of judgment of whatever nature. Code, §§ 310, 311; *Van Schaick v. Winne*, 8 How. 5. The authority of the clerk, however, to tax costs is confined to costs on a judgment, and does not extend to those of an interlocutory nature. *Nellis v. De Forest*, 6 How. 413;

Office hours—Deputy clerks—Disqualification of clerks—Reporters.

Morrison v. Ide, 4 id. 304; *Eckerson v. Spoor*, id. 361; S. C., 3 Code R. 70. It is also the duty of the clerk to make up the judgment roll, on the entry of judgment, in all cases. Code, § 281; *Earle v. Barnard*, 22 How. 437; *Heinemann v. Waterbury*, 5 Bosw. 686; *Renouil v. Harris*, 2 Sandf. 641; S. C., 1 Code R. 125; 2 id. 71. And he is bound to keep, among the records of the court, a book for the entry of judgments (Code, § 279); also, a complete register of all suits and proceedings pending, and such other books as may be necessary. Supreme Court Rule 11.

Section 3. Office hours. The clerk is required to keep his office continually open for certain specific hours during the day. 2 R. S. 285, § 54.

In the county of New York these hours are from 9 A. M. to 4 P. M.

In the other counties from 8 A. M. to 6 P. M., between the 31st of March and the 1st of October; and for the other six months from 9 A. M. to 5 P. M.; Sundays and holidays excepted. Laws of 1860, ch. 276.

Judgments must be entered or docketed within legal hours, and at no other time. Supreme Court Rule 12.

Section 4. Deputy clerks. Each county clerk must appoint a deputy, to act in case of the incapacity or absence of the clerk, or in the event of a vacancy; but the powers of the deputy cease on the vacancy being filled by appointment. 1 R. S. 376, §§ 56–59; *People v. Snedeker*, 14 N. Y. (4 Kern.) 52. A deputy clerk is authorized to perform any ordinary ministerial act in the absence of the clerk, and such act will be valid, without stating the absence of the clerk. *Lucas v. Trustees of Second Baptist Church and Society of Village of Geneva*, 4 How. 353; *Lynch v. Livingston*, 6 N. Y. (2 Seld.) 422.

Section 5. Disqualification of clerk. No clerk or deputy clerk of any court can, during his continuance in office, practice in such court as a counselor, solicitor or attorney. 1 R. S. 109, § 26.

ARTICLE V.

REPORTERS.

Section 1. How appointed. This officer of the court was formerly appointed by the governor, lieutenant-governor and attor-

Reporters — Stenographers — Criers.

ney-general. Laws of 1848, ch. 224. But now the court of appeals has the appointment and removal of its own reporter. Const., art. 6, § 2. And the "supreme court reporter" shall be appointed by the governor, secretary of state and attorney-general, to hold office for five years, subject to removal by the concurrent vote of both branches of the legislature. Laws of 1869, ch. 99.

Section 2. General duties of the office. The general duties attached to the office of reporter are the selection, preparation and publication of the decisions of the respective courts to which they are appointed, and to enable him to perform his duty, the judges of the court must deliver to him their written opinions in all causes in which they shall order the opinion to be reported.

ARTICLE VI.

STENOGRAPHERS.

Section 1. How appointed. Stenographers receive their appointment from the courts, and hold office during the pleasure of the same. The surrogate of the county of New York is authorized to appoint a stenographer to the surrogate's court of said county, who shall hold his position during good behavior, and so long as he efficiently discharges the duties of his office. Code, § 256.

Section 2. Nature and duties of the office. It is the duty of the stenographer to take full stenographic notes of all proceedings in every trial, and to furnish copies of the evidence and proceedings when required, for all of which services he shall be paid a fixed salary, or receive a designated compensation. Code, § 256.

ARTICLE VII.

CRIERS.

Section 1. Duties of criers. These officers are appointed by their respective courts, and hold office during their pleasure. It is their duty to open and adjourn the court by proclamation, attend upon its sittings, call parties, jurors and witnesses, when necessary, and to perform other miscellaneous services.

ARTICLE VIII.

OFFICERS AUTHORIZED TO ADMINISTER OATHS, AND TAKE ACKNOWLEDGMENT OF DEEDS.

Section 1. Commissioner of deeds. A general power for the administration of oaths in suits and proceedings is conferred by statute, upon a judge of any court of record, any circuit judge, supreme court commissioner, commissioner of deeds, or clerk of a court of record; and when so taken and certified by any of the above officers, such oath or affidavit may be used in any court within the State, or before any judicial or other officer, before whom any such cause, matter or proceeding may be pending. 2 R. S. 284, § 49.

Commissioners of deeds are appointed in the several cities, and in addition to their power to administer oaths, as above noticed, they have power to take the proof and acknowledgment of conveyances of real estate, and the discharge of mortgages, and also, to take the acknowledgments of bail, and of satisfaction of judgments in the supreme court, or in the courts of the county or city for which they are appointed. 2 R. S. 282, 283, § 41.

The office of commissioner of deeds has been abolished in the several towns in the State, and their powers and duties transferred to the justices of the peace of such towns. Laws of 1840, ch. 238. The authority of these several officers is strictly local, and no affidavits can be taken by them outside the county of their appointment. *Sandland v. Adams*, 2 How. 127; *Davis v. Rich*, id. 86, 181; *Cook v. Staats*, 18 Barb. 407; *Lane v. Morse*, 6 How. 394. Formerly, judges of courts of record might take affidavits in any county in the State, if they acted as mere supreme court commissioners. *Hopkins v. Menderback*, 5 Johns. 234. But where the venue in an affidavit is in one county, a county judge or recorder of another county cannot take the affidavit, as he has no jurisdiction. *Davis v. Rich*, 2 How. 86; *Snyder v. Olmsted*, id. 181.

Section 2. Notaries public. All the powers of commissioners of deeds are now possessed by notaries public of this State, in addition to their former powers, and without official seal. Laws of 1859, ch. 360.

Taking affidavits, etc. — Receivers, etc.

Section 3. Officers in the service of the United States. A special power to take affidavits is also conferred upon persons holding the rank of colonel, or any higher rank in the New York State volunteers in the service of the United States, and also upon any commissioned officer in said service who is a counselor of the supreme court in this State. Laws of 1862, ch. 471.

Section 4. Disqualifications. The attorney on record in any cause is disqualified from administering an oath in such cause. *People v. Spalding*, 2 Paige, 327; *Taylor v. Hatch*, 12 Johns. 340; *Gilmore v. Hempstead*, 4 How. 153. This rule, however, does not extend to counsel employed, or to any one except the attorney of record. *Hallenback v. Whitaker*, 17 Johns. 2; *Post v. Coleman*, 9 How. 64.

ARTICLE IX.

SPECIAL OFFICERS, ETC., APPOINTED.

Section 1. Receivers, etc. Receivers, committees of the person or estate of lunatics, and guardians, are to a certain extent qualified officers of the court, and so are the depositaries of moneys brought into court. In the absence of special directions on the subject, the authorized depositary of such moneys is the county treasurer of the county in which the action is triable, and, in New York, the chamberlain of that city. 1 R. S. 369-371.

CHAPTER III.

OF THE UNITED STATES SUPREME COURT.

ARTICLE I.

ITS ORGANIZATION.

Section 1. Judges. The several courts of the United States, including the supreme court, owe their existence to that clause of the constitution, which declares that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish." U. S. Const., art. 3, § 1.

The supreme court of the United States, as at present organized by congress, in pursuance of the power conferred by the constitution, consists of a chief justice and eight associate justices, six of whom are required to constitute a quorum. Act of Cong., April 10, 1869; 16 U. S. Stat. at Large, 44. They are appointed by the president of the United States, by and with the advice and consent of the senate. U. S. Const., art. 2, § 2. Their respective terms of office shall continue during good behavior, and for their services they shall receive a compensation which shall not be diminished during their continuance in office. U. S. Const., art. 3, § 1.

Section 2. Officers. The principal officers of the supreme court are attorneys and counselors, clerk and marshal. Attorneys and counselors are admitted to practice under certain rules and regulations of the court, but the two degrees of attorney and counsel are kept separate, and no person is permitted to practice both as attorney and counselor in this court. 1 Kent's Com. 307. It is one of the duties of the attorney-general of the United States to prosecute and conduct all suits in the supreme court in which the United States shall be concerned. Act of Sept., 1789.

The clerk is appointed by the court, and, in addition to the ordinary oath of office, is obliged to give security to the public for the faithful performance of his duty. He has the custody of the seal and records, and it is his duty to sign and seal all process, and to record the proceedings and judgments of the court. Act of Cong., Sept. 24, 1789, § 7.

Its civil jurisdiction.

A marshal is also appointed by the court, who shall take charge of all property of the United States used by said court or its members, and shall serve and execute all process and orders issuing out of said court, or made by any justice thereof. Subject to the approval of the chief justice, he may appoint assistants and messengers. Act of Cong., March 2, 1867; 14 U. S. Stat. at Large, 433.

Section 3. Time and place of sitting. The court holds one term annually in the city of Washington, commencing on the first Monday of December, and continued at discretion. Acts of Cong., April 29, 1802; May 4, 1826; June 17, 1844. The first Monday in August of each year is appointed as a return day. Act of April 29, 1802.

ARTICLE II.

ITS CIVIL JURISDICTION.

Section 1. Original jurisdiction. The original jurisdiction of the supreme court is derived from the constitution, and is confined by that instrument to those cases which affect ambassadors, other public ministers and consuls, and to those in which a State is a party. Art. 3, § 2. Congress has no power to enlarge this jurisdiction, or to extend it to cases other than those enumerated in the constitution. 1 Kent's Com. 315. The trial of issues of fact, in the supreme court in all actions at law against citizens of the United States, shall be by jury. Act. of Cong., Sept. 24, 1789, § 13.

Section 2. Appellate jurisdiction. The appellate jurisdiction of the supreme court vested by the constitution (art. 3, § 2) extends in certain cases over final decisions in the State courts, but it has no power to review its own decisions, either at law or in equity. *Washington Bridge Co. v. Stewart*, 3 How. (U. S.) 413. It also has jurisdiction on an appeal from the final decrees of the circuit courts, of the district courts exercising the powers of circuit courts, and of the superior courts of territories exercising the powers of circuit courts in certain cases. 2 Bouv. Inst. 48. In those cases where original jurisdiction is given to the supreme court, the judicial power of the United States cannot be exercised in its appellate form. *Osborn v. Bank of United States*, 9 Wheat. 738. When the case comes before the

Prohibition and mandamus — Concurrent jurisdiction.

supreme court, the principle or points on which the judges were divided will only be considered. *Wayman v. Southard*, 10 Wheat. 21.

Section 3. Prohibition and mandamus. The power of the supreme court to issue writs of prohibition and mandamus was given by the judiciary act of September 24, 1789, section 13. By this act it has power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and to issue writs of mandamus in cases warranted by the principles and usages of law to any court or person appointed, or holding office under the authority of the United States. That part of the section which gives power to issue writs of mandamus to "persons holding office under the authority of the United States" has been declared void. *Marbury v. Madison*, 1 Cranch, 175.

ARTICLE III.

CONCURRENT JURISDICTION.

Section 1. In what cases. The supreme court of the United States has concurrent jurisdiction with the inferior federal courts and with the State courts, in all cases in law or equity, arising under the constitution, laws and treaties of the United States; or where an alien sues for tort in violation of the law of nations.

Cases wherein the United States are plaintiffs; or wherein foreign ambassadors, consuls, etc., are plaintiffs.

Controversies wherein a State is plaintiff and individuals are defendants, or a State defendant and its own citizens.

Controversies between citizens of different States, or between citizens of the same State, claiming lands under grants of different States.

Controversies between a State, or the citizens thereof, and a foreign State, or between citizens and aliens.

State courts can exercise concurrent jurisdiction with the federal courts only in those cases where previous to the constitution they possessed jurisdiction independent of national authority. 1 Kent's Com. 397.

CHAPTER IV.

OF THE UNITED STATES CIRCUIT COURT.

ARTICLE I.

ITS ORGANIZATION.

Section 1. Judges and circuits. The circuit courts are the principal inferior courts established by congress, under the judiciary act of the 24th of September, 1789. From time to time as new States have been admitted, the number and boundaries of the circuits have been changed; but at present there are nine circuit courts which have jurisdiction respectively over their own circuits. 2 Bouv. Inst. 53.

The chief justice and the associate justices of the supreme court of the United States are allotted among the circuits by order of the court; and, whenever a new allotment shall be required or found expedient by reason of alteration of one or more circuits, or of the new appointment of a chief justice or associate justice, or otherwise, it shall be the duty of the court to make the same, and, if a new allotment shall become necessary at any other time than during the term, such allotment shall be made by the chief justice, and shall be binding until the next term, and until a new allotment by the court. Act of Cong., March 2, 1867, ch. 156, § 11.

A circuit judge is appointed for each of the nine circuits, who shall reside therein, with the same power and jurisdiction as the justice of the supreme court allotted to the circuit. The circuit courts are held by the justice of the supreme court allotted to the circuit, by the circuit judge, or by the district judge sitting alone, or by any two of them. It is the duty of the chief justice, and of each justice of the supreme court, to attend at least one term of the circuit court in each district of his circuit during every period of two years. Act of Cong., April 10, 1869, ch. 22.

Section 2. Officers. The principal officers of the circuit courts are the clerk, attorneys and marshal.

The clerk is appointed by the circuit judge, and his duties .

Its civil jurisdiction — Original jurisdiction.

are to issue writs, make and keep all the records of the court. Act of Cong., April 10, 1869, ch. 22.

The district attorney is an officer appointed by the president, by and with the advice and consent of the senate. His duty is to prosecute, in the district for which he is appointed, all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except in the supreme court in the district in which that court shall be held. Act of Cong., Sept. 24, 1789, § 35; May 15, 1820.

The marshal of the district where the court sits is the ministerial officer of the circuit court.

Section 3. Terms of court. A circuit court is held twice a year in each district of the circuits, by both judges, or by one only if the other does not attend. Act of Cong., April 29, 1802.

ARTICLE II.

ITS CIVIL JURISDICTION.

Section 1. Original jurisdiction. The circuit courts have been vested by statute with original jurisdiction, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500 and the United States are plaintiffs, or an alien is a party, and the suit is between a citizen of the State where the suit is brought and a citizen of another State. Act of Cong., Sept. 24, 1789, ch. 20, § 2. These courts have also original cognizance of all suits arising under the revenue laws of the United States, or under any law of the United States relative to copyrights and patent rights growing out of inventions and discoveries, and to protect such rights by injunction. Acts of April 17, 1800, ch. 25, § 3; February 15, 1819, § 1. The jurisdiction in cases of patents and copyrights applies without fixing any amount as the limit, or as to the character of the parties; and in general, as to the jurisdiction of these courts—it is limited—and, like all other courts of limited jurisdiction, the facts or circumstances which give jurisdiction should appear upon the record either expressly or by necessary implication. *Turner v. The Bank of North America*, 4 Dall. 11.

Appellate jurisdiction — By removal of causes — Mandamus.

Section 2. Appellate jurisdiction. The circuit courts have appellate jurisdiction from all final decrees and judgments in the district courts where the matter in dispute, exclusive of costs, exceeds \$50. Act of Cong., Sept. 24, 1789. Appellate jurisdiction is exercised by means of writs of error; appeals from the district courts in admiralty and maritime jurisdiction; certiorari; or procedendo. 2 Bac. Abr. 812. Appeals from the district to the circuit court take place generally in civil causes of admiralty or maritime jurisdiction. 2 Bouv. Inst. 58.

Section 3. By removal of causes. The right of removing a suit in certain cases, from a State court to the circuit court of the district, is given by the judiciary act of 1789. The cases in which the right of removal may be exercised are specified in the above act. See also Act of Cong., March 3, 1863.

Section 4. Mandamus. The power of the circuit court to issue a mandamus is confined exclusively to cases in which it may be necessary for the exercise of a jurisdiction already existing; as, for instance, if the court below refuse to proceed to judgment, there a mandamus in the nature of a procedendo may issue. *McIntire v. Wood*, 7 Cranch, 504. The circuit court may issue writs of habeas corpus when any person is restrained of his liberty in violation of the constitution, treaties or laws of the United States. Act of Cong., Feb. 5, 1797.

CHAPTER V.

OF THE UNITED STATES DISTRICT COURT.

ARTICLE I.

ITS ORGANIZATION.

Section 1. Judges. The United States are divided into districts, in each of which is a court called a district court, which is to consist of one judge, who is to reside in the district for which he is appointed, and to hold annually four sessions. Act of Cong., Sept. 24, 1789.

Section 2. Officers. The principal officers of the district courts are, the clerk, attorneys and marshal, whose respective duties are the same as those of similar officers in the circuit courts. See ch. 4, art. 1, § 2, *ante*, 260, 261.

ARTICLE II.

ITS CIVIL JURISDICTION.

Section 1. Original jurisdiction. The civil jurisdiction of the district courts extends to admiralty and maritime causes; to cases of seizure on land under the laws of the United States, and in suits for penalties and forfeitures incurred under those laws; to cases in which an alien sues for a tort in violation of the laws of nations, or of a treaty of the United States; to suits instituted by the United States; to actions by and against consuls, and to certain cases in equity. Act of Cong., Sept. 24, 1789, § 9.

Section 2. Admiralty. The original admiralty jurisdiction of the district courts is exclusive; and within it is comprehended, prize suits, cases of salvage, actions for torts, and actions on maritime contracts. 2 Bouv. Inst. 62.

Section 3. Marine torts. The district court has jurisdiction over all cases of tort, or injuries committed upon the high seas, and in ports and harbors within the ebb and flow of the tide. *Martin v. Hunter's Lessee*, 1 Wheat. 304; *The Amiable Nancy*, 3 id. 546. Thus the district court as a court of admiralty has

jurisdiction to redress personal wrongs committed on a passenger, on the high seas, by the master of a vessel, whether those wrongs be by direct force or consequential injuries. *Chamberlain v. Chandler*, 3 Mason's C. C. 242.

Section 4. Maritime contracts. The district court has a jurisdiction, concurrent with the common-law courts, over all maritime contracts, wheresoever the same may be made or executed, or whatsoever be the form of the contract. *De Lovio v. Boit*, 2 Gall. C. C. 398. Contracts regulated by the common law are excluded from the jurisdiction of the admiralty, by the seventh amendment to the constitution. *Bains v. The James*, Baldw. C. C. 544. Unless a contract be essentially maritime, the jurisdiction does not attach. *The Jefferson*, 10 Wheat. 428.

Section 5. Concurrent jurisdiction. The concurrent jurisdiction of the district court with the State courts, or the circuit court, as the case may be, extends to causes where an alien sues for a tort committed in violation of the law of nations, or of a treaty of the United States; and of all suits at common law, in which the United States are plaintiff, and the matter in dispute amounts, exclusive of costs, to \$100. Act of Cong., Sept. 24, 1789, ch. 20, § 9.

Section 6. Actions by and against consuls. The district court has jurisdiction of actions by and against consuls or vice-consuls, exclusively of the courts of the several States, except for offenses where other punishment than a fine exceeding \$100 or a term of imprisonment exceeding six months is inflicted. Formerly, in offenses above this description, the circuit court alone had jurisdiction in cases of consuls. *Commonwealth v. Kosloff*, 5 Serg. & Rawle, 545. But, by the act of August 23, 1842, the district courts shall have concurrent jurisdiction with the circuit courts, of all crimes and offenses against the United States, the punishment of which is not capital.

Section 7. Injunction. The judges of the district courts of the United States have, in cases where the party has not had a reasonable time to apply to the circuit court, as full power to grant writs of injunction to operate within their respective districts as is exercised by the judges of the supreme court, and to continue until the next circuit court. Act of Feb. 13, 1807, ch. 13, § 1. Further power to grant injunctions in particular cases is given by act of May 15, 1820, ch. 107, §§ 4, 5.

Bankruptcy — Habeas corpus.

Section 8. Bankruptcy. By the bankrupt law, the district courts are vested with original jurisdiction in all matters and proceedings in bankruptcy, and they shall always be open as courts of bankruptcy. The discharge of the bankrupt is granted by the judge of the district court. Act of Cong., March 2, 1867, ch. 176.

Section 9. Habeas corpus. The judges of the district courts may grant writs of habeas corpus, for the purpose of inquiry into the cause of commitment. Act of Sept. 24, 1789. And by subsequent acts, they have power to issue writs, take depositions, make rules and the like.

CHAPTER VI.

OF THE REMOVAL OF CAUSES TO THE UNITED STATES CIRCUIT COURT.

ARTICLE I.

IN WHAT CASES.

Section 1. In general. The power to remove a cause from a State court into the circuit court of the United States was conferred by the judiciary act of 1789. By the provisions of this act, the power of removal may be exercised in cases where a suit is brought against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, and the value of the matter in dispute exceeds, exclusive of costs, \$500; and in controversies between citizens of the same State claiming lands under grants of different States. Act of Cong., Sept. 24, 1789, ch. 20, § 12.

Subsequent acts of congress further provide that, where a suit or prosecution shall be commenced in a court of any State against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority, or title set up or claimed by such officer, or other person, under any such law of the United States, such action may be removed to the circuit court and the proceedings in the State court shall be stayed, and if the defendant has been arrested the circuit court shall issue a habeas corpus. Act of Cong., March 2, 1833.

If any suit is commenced in any State court against any officer or other person for any arrests or acts done by him during the rebellion of 1861, by virtue or under color of any authority derived from, or exercised by, or under the president of the United States, or any act of congress, such suit may be removed to the circuit court. Acts of Cong., March 3, 1863, May 11, 1866, January 22, 1869.

If a suit is brought in any State court in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, and the matter in

In what cases.

dispute exceeds \$500, such citizen of another State, whether plaintiff or defendant, may remove the suit to the circuit court, if he files an affidavit stating that he believes that from prejudice or local influence he will not be able to obtain justice in such State court. Act of Cong., March 2, 1867.

Any corporation, or any member thereof, other than a banking corporation, organized under a law of the United States, and against which a suit at law or in equity has been, or may be, commenced, in any court other than a circuit or district court of the United States for any liability or alleged liability of such corporation, or any member thereof, as such member, may have such suit removed from the court in which it may be pending to the proper circuit or district court of the United States, upon filing a petition therefor, verified by oath, either before or after issue joined, stating that they have a defense arising under or by virtue of the constitution of the United States, or any treaty or law of the United States, and offering good and sufficient security for entering in such court, on the first day of its session, copies of all process, proceedings, etc., and doing such other appropriate acts as are required to be done by act of congress of July 27, 1866. And it shall thereupon be the duty of the court to accept the surety, and to proceed no further in the suit. And the said copies being so entered as aforesaid in such court (of the United States), the suit shall then proceed in the same manner as if it had been brought there by original process, etc. Act of Cong., July 27, 1868, ch. 245, § 2.

To bring the above provisions of the statutes into operation, it is required that the case should come strictly within their terms. *Cooley v. Lawrence*, 12 How. 176; S. C., 5 Duer, 605.

Thus, the act of 1789 is held not to apply where both the parties are non-residents of the State. *Smith v. Butler*, 38 How. 192. And, where three out of four plaintiffs were aliens, and the fourth a citizen, an application of the defendant was denied. *Denniston v. The New York and New Haven R. R. Co.*, 2 Abb. 278; affirmed, id. 415; S. C., 1 Hilt. 62.

So, the provisions of the judiciary act do not authorize a removal of an action brought against more than one defendant, if any defendant is a citizen of the State in which the action is brought. *Fisk v. Chicago, Rock Island and Pacific Railroad Co.*, 3 Abb. N. S. 453; S. C., 53 Barb. 472; id. 513. The complainant in a bill of interpleader is not, before being discharged

In what cases.

by a decree that the defendants interplead, to be deemed a mere nominal party; and though the defendants are citizens of different States, the cause cannot be removed to the United States court before such decree, if one of the defendants is of the same State with the complainant. *Leonard v. Jamison*, 2 Edw. Ch. 136; *Ward v. Arredondo*, 1 Paine's C. C. 410.

In a suit between aliens, the declaration by the plaintiff of his intention to become a citizen of the United States does not entitle the defendant to a removal of the cause to the United States court. *Mossman v. Higginson*, 4 Dall. 12; *Montalet v. Murray*, 4 Cranch, 46; *Browne v. Strobe*, 5 id. 303; *Jackson v. Twentyman*, 2 Pet. 136; *Orosco v. Gagliardo*, 22 Cal. 83.

It is now settled that corporations are citizens within the rule of the statute; and the right of a corporation to the removal of an action against it from the court of any other State to a court of the United States, is not affected by the fact, that it had appointed, within the State where the suit was brought, an agent for the service of process on it, according to the laws of such State, nor by the fact that a portion of its directors reside within such State. *Stevens v. Phoenix Insurance Co.*, 41 N. Y. (2 Hand) 149; reversing S. C., 24 How. 517; *Fisk v. Chicago, Rock Island and Pacific Railroad Co.*, 3 Abb. N. S. 453; S. C., 53 Barb. 472; *Fisk v. Union Pacific Railroad Co.*, 10 Abb. N. S. 457, 467; *Barney v. Globe Bank*, 2 Am. Law Reg. N. S. 221. A corporation created by the laws of one State, and having its principal place of business and holding its meetings there, must be regarded, for purposes of jurisdiction, as a citizen of that State, although its business consists of traffic between that State and another. *Kranshaar v. New Haven Steamboat Co.*, 7 Rob. 356. And a railroad corporation of one State, authorized by a law of another State to extend its track into the latter, and do business therein, is still a citizen of the former, and not of the latter State. *Denniston v. New York and New Haven Railroad Co.*, 1 Hilt. 62; S. C., 2 Abb. 278, 415. Actions commenced in the courts of this State, by one foreign corporation against another, cannot be removed under the act of 1789. *Ayers v. Western Railroad Co.*, 48 Barb. 132; S. C., 32 How. 351. But, where the assignee of a foreign corporation, suing another foreign corporation, is a citizen of this State, the action may be removed, provided the claim is of such a nature that the United States can take cognizance of it. *Ib.*

 Proceedings for removal.

To justify a removal the matter in dispute must exceed \$500, and, if any doubt exists as to what is the real amount in dispute, the State court may inquire into it by the evidence. *Ladd v. Tudor*, 3 Woodb. and M. 325. But the defendant cannot be deprived of the right to a removal, by an amendment reducing the amount claimed below \$500, allowed in the State court after the removal has become complete. *Kanouse v. Martin*, 15 How. (U. S.) 198.

An action to set aside an issue of corporate stock to a large amount, and to enjoin any future transfers or sales thereof, is a case where the matter in dispute exceeds the sum of \$500, exclusive of costs. *Fisk v. Chicago, Rock Island and Pacific Railroad Co.*, 3 Abb. N. S. 453; S. C., 53 Barb. 472.

Under section 12 of the judiciary act of 1789, all the defendants were required to join in an application for the removal of a cause from a State into a federal court, and upon a like application for a removal under the act of 1867, on the ground that, from prejudice or local interest, justice cannot be obtained in the State court, all the parties defendant must be joined. *Cooke v. The State National Bank of Boston*, 1 Lans. 494; *Bryan v. Ponder*, 23 Ga. 480; *Calderwood v. Hager*, 20 Cal. 167.

In an action of tort against several, one only being served, and the others returned not found, the one served may alone petition for a removal. *Norton v. Hayes*, 4 Denio, 245. And where one of two defendants is a citizen of another State and there is no joint trust, interest, duty, or concern, in the subject-matter of controversy, he may be allowed to appear and defend alone so as to enable him to remove the cause. *Livingston v. Gibbons*, 4 Johns. Ch. 94.

ARTICLE II.

PROCEEDINGS FOR REMOVAL.

Section 1. Petition for. The proceedings for removal, in cases where a removal is allowed by section 12 of the judiciary act of 1789, must be commenced by the defendant, who shall file a petition in the State court for the removal of the cause for trial into the next circuit court to be held in the district where the suit is pending. Act of 1789, § 12.

Facts necessary to bring the case within the provisions of the

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Proceedings for removal.

12th section must appear in the petition, to fully satisfy the court; but if by accident the statement of a material fact is omitted, it may be supplied. *Field v. Blair*, 1 Code R. N. S. 292; S. C. affirmed, id. 361.

It must be stated in the petition that the petitioner is a citizen of another State. *Corp v. Vermilye*, 3 Johns. 145; *Eastin v. Rucker*, 1 J. J. Marsh, 232; *Beebe v. Armstrong*, 11 Martin, 440. The court must be satisfied as to the petitioner's alienage or citizenship in another State, as well as in respect to the amount in controversy. *Disbrow v. Driggs*, 16 How. 346; S. C., 8 Abb. 305, note. See *Eastin v. Rucker*, 1 J. J. Marsh, 232; *Beebe v. Armstrong*, 11 Martin, 440. Alleging citizenship, at the present time, is not enough. *Savings Bank of Cincinnati v. Benton*, 2 Metc. (Ky.) 240; *People v. Western Transportation Co.*, 34 Ill. 356; *Holden v. Putnam Fire Ins. Co.*, 46 N. Y. (1 Sick.) 1. The petition must, in all cases, be verified. Id.; *Ogden v. Baker*, 1 Greene (N. J.) 75.

Where the application is made by a corporation, the affidavit must be by an officer authorized to make it. A secretary is not presumed to be authorized, for it is not an act within his ordinary powers or duties. *Dodge v. North Western Packet Co.*, 16 Minn. 458.

The petition must be filed, at the time specified by the statute, in order to entitle the petitioner to a removal. Serving the petition on the plaintiff with notice of presenting it, followed by the filing of the petition on moving at a subsequent term, is not enough. *Redmond v. Russell*, 12 Johns. 153. Only the defendant served need petition, and if the petition is signed by the attorney it is sufficient. *Cooke v. State National Bank of Boston*, 1 Lans. 494; *Vandevoort v. Palmer*, 4 Duer, 677.

The court will not grant an order of removal upon the petition when filed without notice to the plaintiff, or an order to show cause. *Disbrow v. Driggs*, 16 How. 346; S. C., 8 Abb. 305, note; *Bristol v. Chapman*, 34 How. 140. In proceedings under section 12, for the removal of a cause, where the subject of controversy involves a question as to the validity of conflicting grants of two different States, no petition is necessary, the application of either party on affidavit being sufficient for the purposes of a motion. *Cooke v. State National Bank of Boston*, 1 Lans. 494.

Petition for removal — Verification.

Petition for removal (Defendant an alien).

(Title of cause.)

To the court of

The petition of respectfully shows to this court:

I. That an action has been brought in this court against the petitioner by the plaintiff above named.

II. That this action is brought upon the following cause: (*State the nature of the cause of action.*)III. That the matter in dispute exceeds the sum of \$500, exclusive of costs, as appears by the summons and complaint (*or, if the demand is unliquidated, state facts supporting the allegation as to its amount.*)

IV. That the petitioner is an alien, to wit: A subject or citizen of

V. That the petitioner now does enter his appearance in this action, but has not done so heretofore.

VI. That he hereby offers good and sufficient surety for his entering in the next circuit court for the district of the State of , on the first day of its session, copies of the process against him in this action; and also for his there appearing and entering special bail in the action, if special bail were originally requisite therein, according to the law and practice of the United States and its courts.

YOUR PETITIONER, THEREFORE, asks that the said cause may be removed for trial into the next circuit court to be held in the district where the same is pending, to wit: Into the next circuit court for the district of the State of , pursuant to the provisions of the said statutes of the United States, in such case made and provided, and that this court do accept the surety offered by your petitioner, as aforesaid, and do proceed no further in the said cause, and for such further or other order or relief in the premises as may be just.

(Date.)

(Signature.)

Verification.

(Venue.)

, being duly sworn, says, that he has read (*or heard read*) the foregoing petition subscribed by him, and knows the contents thereof; and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

(Jurat.)

(Signature.)

Petition for removal (where parties are citizens of different States.)

[Same as preceding, to subdivision IV.]

IV. That the plaintiffs in this action are all citizens of this State; that the petitioner and all his co-defendants are citizens

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Attorney's affidavit for a stay of proceedings.

of other States of the United States, to wit: is a citizen of
of the State of , and and are citizens of the State
of

V.* [Same as the preceding form to the end.]

Petition for removal (where plaintiffs are a corporation).

[Same as petition, where defendant is an alien, to subdivision IV.]

IV. That the plaintiffs are a corporation created by the laws of the State of , and doing business therein; that the petitioner and all his co-defendants are citizens of other States of the United States, to wit (*as in preceding form*); or if they are a corporation, that the petitioner is a corporation created by the laws of the State of , and doing business therein.

V. [As in preceding forms to the end.]

Petition for removal (where action is by an assignee).

[Same as in first form, to subdivision IV.]

IV. That the assignor of the chose in action, under whom the plaintiff in this action claims (insert the facts as to alienage or citizenship, so as to show the jurisdiction of the circuit court).

V. [As in preceding forms to the end.]

Attorney's affidavit for a stay of proceedings.

(*Title of cause.*)

(*Venue.*)

, being duly sworn, says:

I. That he is the attorney for the defendant (or one of the attorneys for the defendant) in the above entitled cause.

II. That, on the day of , A. D. 18 , deponent caused the appearance of the defendant in the above suit to be entered with the clerk of county, at .

III. That, at the time of entering said appearance, the defendant caused to be filed with said clerk a petition for the removal of the above cause from the State court to the United States circuit court for the district of New York, and a bond, with suitable sureties, all as required by the section of the judiciary act of congress of (1789).

IV. That the deponent, as attorney as aforesaid, desires to move, before the term of this court, as soon as the said motion can be made and heard, for an order removing this cause to the United States circuit court for the district of New York.

V. That the defendant desires a stay of proceedings, in order to enable said motion to be made.

VI. That the above action was begun on or about the day of , A. D. 18 , by the service on the defendant of a summons.

Security.

VII. That the sum sued for and in dispute exceeds \$500, exclusive of costs.

VIII. That at the time said suit was begun, and at the present time, the plaintiff was and is a citizen and resident of , and the defendant was and is a citizen and resident of .

IX. That until said day of , A. D. 18 , the defendant had not appeared in this action.

(*Jurat.*)

(*Signature.*)

Section 2. Security. On filing the petition for removal, the defendant "shall offer good and sufficient surety for his entering in such court, on the first day of its session, copies of said process against him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein." Act of 1789, ch. 20, § 12.

The plaintiff is entitled to a joint and several bond from the defendant, and it must be filed at the time of filing the petition. *Roberts v. Canington*, 2 Hall, 649. And the court must be satisfied as to the sufficiency of the security, as a prerequisite to the removal. *Cooley v. Lawrence*, 5 Duer, 605; *Vandervoort v. Palmer*, 4 id. 677. As a rule of practice no sureties should be approved by the court unless the amount of the bond is equal to the sum in which the defendant in the action has been held to bail, if bail has been required in the State court; and this fact should be made to appear to the satisfaction of the judge to whom the bond is presented for approval. *Jones v. Seward*, 17 Abb. 377; S. C., 41 Barb. 269; 26 How. 433; reversing 40 Barb. 563, and 26 How. 33.

From the following cases it appears, that the practice in this State is to tender the bond to the court at the time of application for removal, or to file it previously. *Jones v. Seward*, *supra*; *Patrie v. Murray*, 43 Barb. 323; *Anderson v. Manufacturers' Bank*, 14 Abb. 436; *Cooley v. Lawrence*, 5 Duer, 605; *Fairchild v. Durand*, 8 Abb. 305; *Vandervoort v. Palmer*, 4 Duer, 677; *Norton v. Hayes*, 4 Denio, 245; *Suydam v. Smith*, 1 id. 263; *Roberts v. Canington*, 2 Hall, 649; *Blanchard v. Dwight*, 12 Wend. 192; *Carpenter v. New York and New Haven Railroad Co.*, 11 How. 481; *Field v. Blair*, 1 Code R. N. S. 292, 361; *Durand v. Hollins*, 3 Duer, 686; *Livermore v. Jenks*, 11 How. 479. The bond need not be signed by the petitioner, but is sufficient if signed by sureties only. *Vandervoort v. Palmer*, 4 Duer, 677.

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Form of security.

Form of Security.

KNOW ALL MEN by these presents, that we, _____ of _____ and _____ of _____, are hereby held and firmly bound unto _____ (the plaintiff in this action), his executors, administrators and assigns, in the sum of _____ dollars, lawful money of the United States of America, to be paid to the said _____, his executors, administrators or assigns, for which payment well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, and every of them, forever by these presents.

Sealed with our seals this _____ day of _____, in the year of our Lord _____

I. WHEREAS the above-named _____ has comenced an action in the _____ court, against (the above bounden)

II. And whereas the said _____ has entered his appearance in such action in said court, and at the same time has filed his petition for the removal of this cause into the next circuit court to be held (*etc., as in petition*): Now, therefore, the condition of the above obligation is such that if the said _____ shall enter in said circuit court, on the first day of its session, copies of the process against him in said cause, and shall, also, then and there appear and enter special bail in the cause if special bail was originally requisite therein, according to the law and practice of the United States and its courts, then these presents and obligations shall be void, or otherwise to remain in full force.

In witness whereof the said obligors have hereunto set their hands and seals this _____ day of _____, A. D. 18 _____.

(Signatures.) [L. S.]
[L. S.]

Justification of the Above.

(Venue.)

A. B., C. D., and E. F., above named, being severally duly sworn, say each for himself, that he is a resident of the State of New York, as mentioned in the above undertaking, and a householder (*or* freeholder) therein, and worth double the sum specified in the said undertaking over all his debts and liabilities, and exclusive of property exempt from execution.

(Jurat.)

Acknowledgment of same.

(Venue.)

I CERTIFY, that on this _____ day of _____, 18 _____, A. B., C. D., and E. F., above named, to me known to be the persons described in and who executed the above, personally appeared before me, and severally acknowledged that they executed the above undertaking as their own free act for the uses and purposes therein mentioned.

(Signature.)

Application, when made.

Notice of offer to be indorsed on foregoing undertaking.

(Title of cause.)

Please take notice, that the within is a copy of an undertaking which the defendant in this action hereby offers to give upon the removal of this cause to the circuit court of the United States, for the district of .

(Date.)

(Signature.)

(Address.)

Notice of motion.

(Title of cause.)

Please take notice, that upon the petition and appearance of the defendant, of which a copy is hereto annexed, and which were on day of , 18 , filed in this court, and upon the undertaking of the petitioner and his sureties, a copy of which is also annexed, this court will be moved at a special term thereof, to be held at , on the day of , 18 , that the petition be granted and the cause be removed to the circuit court mentioned in the petition, and that this court accept the surety offered and proceed no further therein, and for such other and further relief as may be just.

(Date.)

(Signature.)

(Address.)

Section 3. Application, when made. Application for the removal of a cause, by the defendant, must be made at the time of entering his appearance, and any submission to the authority of the court is held to be an appearance under the statute, and when such submission has once been made, it cannot be retracted. *Cooley v. Lawrence*, 5 Duer, 605; S. C., 12 How. 176; *Dart v. Arnis*, 19 id. 429. The giving of bail upon arrest is not such a proceeding as will amount to a virtual appearance. The terms "entering an appearance," used in the act of congress, simply import an act in court, by which the defendant concedes that the State court has full jurisdiction over him. *Suydam v. Smith*, 1 Denio, 265; *Durand v. Hollins*, 3 Duer, 686. Neither is the service of a notice of retainer an appearance, such as to require the filing of the petition at the same time. *Norton v. Hayes*, 4 Denio, 245; *Field v. Blair*, 1 Code R. N. S. 292; affirmed, id. 361.

A petition filed with the notice of appearance after the defendant was in default for not answering, but before judgment had been actually entered by the plaintiff, was held sufficient to

 Proceedings — Order to show cause.

effect a removal. *Carpenter v. New York and New Haven Railroad Company*, 11 How. 481.

Section 4. Proceedings. After the requirements of the statute have been fully complied with by the party making application for removal, and no sufficient objection being shown, it becomes the positive duty of the State court to grant the order and proceed no farther with the cause. When the proper papers are presented the State court has not the legal discretion to refuse an order removing the cause. *Gordon v. Longest*, 16 Pet. 97; *Stevens v. Phoenix Ins. Co.* 41 N. Y. (2 Hand) 149. The State court is, however, to exercise a discretion in determining whether the case is within the statute and to deny a removal in doubtful cases. *Anderson v. Manufacturers' Bank*, 14 Abb. 436; *James v. Thurston*, 6 R. I. 428.

The order once made cannot be vacated, or the court re-invested with any jurisdiction over the case in any form. *Livermore v. Jenks*, 11 How. 479; *Liddle v. Thatcher*, 12 id. 295. The court may remove the cause to either district it deems proper (*Suydam v. Smith*, 1 Denio, 263; *Norton v. Hayes*, 4 id. 245), and after removal the proceedings in the cause must be in accordance with the rules of the court into which the removal is made. *Suydam v. Ewing*, 1 Code R. N. S. 294.

The petitioner, after removal, must perfect proceedings, by entering an appearance in the circuit court before next term of the same, enter special bail where an order of arrest has issued from the State court, and file certified copies of the process and papers by which the action was originally commenced. *Martin v. Kanouse*, 1 Blatchf. C. C. 149. When such copies have been entered a new declaration must be filed in the circuit court by the plaintiff. *Clarke v. Protection Ins. Co.*, 1 Blatchf. C. C. 150.

An appeal does not lie to the court of appeals from an order removing a cause to the United States court. *Illius v. New York and New Haven R. R. Co.*, 13 N. Y. (3 Kern.) 597. See *Kanouse v. Martin*, 6 How. 240; S. C., 1 Code R. N. S. 385.

Order to show cause.

(*Title of cause.*)

The defendants having this day entered their appearance in this cause, and at the same time filed a petition praying for a removal of this action to the circuit court of the United States for the district of , pursuant to the act of congress of

In other cases.

the United States in such case provided, and offered the surety as therein provided by an undertaking now filed. It is

ORDERED: That the plaintiffs show cause on the day of , 18 , at o'clock in the noon, at a special term of this court to be held at , why the prayer of the said petition should not be granted.

*Order removing cause to the United States Circuit Court.**(Title of cause.)**(At a special term, etc.)*

A petition having been filed by the defendant in this cause at the time of entering his appearance herein, on the day of , 18 , praying for the removal thereof into the circuit court for the district of , pursuant to the statutes of the United States in such case made and provided, and the said petitioner having offered good and sufficient security pursuant to the directions of, and as required by, the said statute: now, on motion of , of counsel for the petitioner, and after hearing , of counsel for the plaintiff, in opposition thereto, it is declared that it is made to appear, to the satisfaction of this court, that the present suit is commenced in this court by a citizen of the State of New York against a (citizen of another State), and that the matter in dispute exceeds \$500, exclusive of costs. And it is hereby further declared and

ORDERED: That this court accepts the surety offered by the petitioner, and that the said cause be removed for trial unto the next circuit court to be held in the district of the State of , pursuant to the said statutes; and that this court do proceed no further therein, and that all proceedings in this court, in the said cause, be and the same are hereby stayed.

And it is further ordered, that this removal shall not operate of itself to dissolve the injunction heretofore issued in this cause, but the same shall remain in force until dissolved by this court, or by the said circuit court.

Section 5. In other cases. The proceedings on the removal of a cause from a State to a federal court, in cases other than those embraced in section 12 of the judiciary act, differ materially in many respects from the proceedings already described.

In cases under act of congress, March 2, 1833, the removal is effected by means of a writ of *certiorari* or *habeas corpus*, issued by the federal tribunal, on petition of the defendant, and not by any application to the State court in which such controversy is pending. Act of Cong., March 2, 1833, § 3; 4 Stat. 633.

A cause commenced in any State court may be removed into the circuit court of the United States, under the act of congress, March 3, 1863, upon filing a petition, stating the facts, duly veri-

In other cases.

fied, at the time of entering an appearance in such court; or, after final judgment, by an appeal, during the session or term of said court at which such judgment shall have taken place; or, within six months after the rendition of a judgment in any such case, by writ of error or other process, to remove the same to the circuit court of the United States, of the district in which the judgment shall have been rendered. See Act of Cong., March 3, 1863, ch. 81, § 5. So much of the above section as authorizes the removal of a cause after verdict, and a trial and determination of the facts and the law, has been declared unconstitutional. *Patrie v. Murray*, 29 How. 312; S. C., 43 Barb. 323; *Benjamin v. Murray*, 28 How. 193. 9 Wall. 274.

The last cases in which proceedings for removal remain to be noticed are such as come under the provisions of act of congress, March 2, 1867, relating to the removal of certain suits into the circuit court of the United States, when, from local influence, etc., justice cannot be had in the State court. To obtain a removal under this act it is required of the party seeking the removal to make an affidavit that he has reason to believe, and does believe, that, from prejudice or local influence, he will not be able to obtain justice in the State court, and he must file the same, with a petition, and offer the requisite security for proceeding in such court; and thereupon, in actions where the matter in dispute exceeds \$500, the State court is directed to accept the security and proceed no further in the suit. Act of Cong., March 2, 1867; 14 U. S. Stat. at Large, 558. An application for the removal of a cause from a State court into the federal court under this act, should not be granted, when made by one of several defendants. *Cooke v. State National Bank of Boston*, 1 Lans. 494.

The cases in which a cause may be removed from a State court into the circuit court of the United States, enumerated in the last section, under the respective acts of congress, conferring the power of removal, being of comparatively rare occurrence in practice, a brief notice of the proceedings under each has been deemed a sufficient guide, in this connection, to the practicing lawyer or the diligent student.

CHAPTER VII.

OF THE COURT OF APPEALS.

ARTICLE I.

ORGANIZATION.

Section 1. Early court of last resort. The organization of a court of appeals, or "court of last resort," as it was generally designated, was thus provided for by the first State constitution, adopted in 1777, the 32d article of which declares "that a court shall be instituted for the trial of impeachments and the correction of errors, under the regulations which shall be established by the legislature, to consist of the president of the senate, for the time being, and the senators, chancellor and judges of the supreme court, or the major part of them." In pursuance of this constitutional provision, it was enacted by the legislature that such court should hold its sessions at any time during the sitting of the legislature, on such days, and at such places, as the persons constituting the court should from time to time appoint. Act of Feb. 20, 1801; 1 R. L. 132, § 1.

Section 2. Court for correction of errors, before constitution of 1846. The second State constitution, adopted in 1822, in article 5, section 1, recognizes the existence and organization of the early "court of last resort," and a statutory provision (2 R. S. 166, §§ 24, 25), which is, in substance, a reenactment of the old statute on the subject (1 R. L. 132) defines the powers and jurisdiction of such court. As thus organized by the first constitution of 1777, and by the statutes enacted in pursuance of its provisions, the old court of errors continued to exist under the provisions of the constitution of 1822, as a court of last resort, until its final abolition, in 1846.

Section 3. Court of appeals under constitution of 1846. The court of appeals, as organized in pursuance of the provisions of the constitution of 1846, was composed of eight judges, four elected by the electors of the State for terms of eight years, so classified that one should be elected every second year, and

Present organization — Jurisdiction before 1846.

four selected from the class of justices of the supreme court having the shortest term to serve. Const., art. 6, § 2.

The judge elected by the electors of the State having the shortest time to serve was the chief judge of the court (Laws of 1847, ch. 280, § 5); and six judges constituted a quorum for holding any term of this court. Id., § 6; *Oakley v. Aspinwall*, 3 N. Y. (3 Comst.) 547.

Section 4. Present organization. The court of appeals, as it now exists, derived its organization from the provisions of the 6th article of the constitution, as amended in 1869.

The court is composed of a chief judge and six associate judges, chosen by the electors of the State, for the term of fourteen years, from and including the first day of January next after their election. Five members of the court are sufficient to constitute a quorum, and the concurrence of four is necessary to a decision. Const. 1869, art. 6, § 2; Laws of 1870, ch. 86.

In case of a vacancy otherwise than by expiration of term, in the office of the chief, or of an associate judge, the same is to be filled for a full term at the next general election, happening not less than three months after such vacancy occurs; and until the vacancy is so filled, the governor, by and with the advice and consent of the senate, or, if the senate be not in session, then the governor alone, may fill such vacancy by appointment. Const. 1869, art. 6, § 3.

Judges of the court of appeals may be removed by concurrent resolution of both houses of the legislature, if two-thirds of all the members elected to each house concur therein. Id., § 11.

ARTICLE II.

JURISDICTION.

Section 1. Jurisdiction before 1846. The jurisdiction of the old "court for the correction of errors," which as a court of law was exclusively a court of appeal, was derived from the constitution of the State (Const. 1777, art. 32), and fully designated by statute. 1 R. L. 133, §§ 7 to 10; 2 R. S. 166, §§ 24, 25.

Its jurisdiction was wholly appellate, and it could be exercised only where some question had been actually presented to the court below for its determination, and a judgment or decision

pronounced thereon; and it was held that, whenever a final decision was made in the supreme court, of which a record could be made, and which should decide the rights of property or personal liberty, the statute gave jurisdiction to this court. *Yates v. The People*, 6 Johns. 337.

Section 2. Jurisdiction under constitution of 1846. The court of appeals, as organized under the provisions of article 6 of the constitution of 1846, possessed exclusive jurisdiction to review, upon appeal, every actual determination made at a general term by the supreme court, or by the superior court of the city of New York, or the court of common pleas for the city and county of New York, or the superior court of the city of Buffalo, in the cases specified under section 11 of the Code of Procedure. See Code, § 11.

And, in addition to the special powers conferred by the Code, it had also jurisdiction of all cases pending in the old court of errors, transferred to it as directed by the constitution. Art. 6, § 25; by the judiciary act, ch. 280 of 1847, § 12.

Section 3. Jurisdiction at present. By act of April 14, 1870, it is provided "that the court of appeals instituted by the 6th article of the constitution shall possess all the powers and jurisdiction heretofore possessed by the existing court of appeals, and all laws authorizing and regulating appeals to the last-mentioned court, and other laws relating thereto, the judges thereof, their powers and duties, and not inconsistent with the constitution or with this act, shall be deemed in force and applicable to the court in this section first mentioned, and to the judges thereof; provided, however, that no existing law which relates to the rehearing of causes in such court shall be in force, and provided further, that the court may prescribe the times and places of holding its terms, except as hereafter provided." Laws of 1870, ch. 203, § 1. Its jurisdiction is thus defined by section 11 of the Code.

§ 11. "The court of appeals shall have exclusive jurisdiction to review, upon appeal, every actual determination hereafter made at a general term by the supreme court, or by the superior court of the city of New York, or the court of common pleas for the city and county of New York, or the superior court of the city of Buffalo, in the following cases, and no other:

1. In a judgment in an action commenced therein or brought there from another court; and upon the appeal from such judg-

Jurisdiction at present.

ment to review any intermediate order involving the merits, and necessarily affecting the judgment.

2. In an order affecting a substantial right, made in such action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action, and when such order grants or refuses a new trial, or when such order strikes out an answer, or any part of an answer, or any pleading in an action; but no appeal to the court of appeals from an order granting a new trial on a case made or bill of exceptions, shall be effectual for any purpose, unless the notice of appeal contain an assent on the part of the appellant, that, if the order be affirmed, judgment absolute shall be rendered against the appellant. Upon every appeal from an order granting a new trial, on a case made or exceptions taken, if the court of appeals shall determine that no error was committed in granting the new trial, they shall render judgment absolute upon the right of the appellant; and after the proceedings are remitted to the court from which the appeal was taken, an assessment of damages or other proceedings to render judgment effectual may be then and there had, in cases where such subsequent proceedings are requisite.

3. In a final order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, and upon such appeal to review any intermediate order involving the merits and necessarily affecting the order appealed from. But such appeal shall not be allowed in an action originally commenced in a court of a justice of the peace, or in the marine court of the city of New York, or in an assistant justice's court of that city, or in a justice's court of any of the cities of this State, unless any such general term shall, by order duly entered, allow such appeal before the end of the next term after which such judgment was entered. The foregoing prohibition shall not extend to actions discontinued before a justice of the peace and prosecuted in another court pursuant to sections 60 and 68 of this Code.

4. Whenever the decision of any motion heretofore made, or of any motion hereafter to be made, in the supreme court of this State, at a special term thereof, involves the constitutionality of any law of this State, or has been or shall be placed in the opinion or reasons for such decision, of the justice making such decision, upon the unconstitutionality of such law, then an

Powers before 1846.

appeal shall lie, and may be made from such decision or from the order entered, or to be entered upon such decision, to the general term of said court, and an appeal shall also lie and may be made from the decision of such general term, and from any order entered, or to be entered thereon, to the court of appeals; provided, however, that the time for appealing from such decision, or from such order, shall not be extended hereby; and such appeal at the general term, and at the court of appeals, shall be heard as a non-enumerated motion. In an order affecting a substantial right, not involving any question of discretion arising upon any interlocutory proceeding, or upon any question of practice in the action, including an order to strike out an answer, or any part of an answer, or any pleading in an action, such appeals, whether now pending or hereafter to be brought, may be heard as a motion, and noticed for hearing for any regular motion day of the court."

As to subdivision four of the section just quoted, see *People v. Auditors of Westford*, 1 Alb. L. J. 60; Wait's Code, 33, note.

The present court of appeals, upon its organization, also became invested with the jurisdiction of all causes then pending in the late court of appeals. Const. 1869, art. 6, § 4. As to the manner in which such of said causes as were pending on the 1st day of January, 1869, are to be heard and determined, see Const. 1869, art. 6, §§ 4, 5; and act of April 14, 1870, Laws of 1870, ch. 203, §§ 3-6.

ARTICLE III.

POWERS.

Section 1. Powers before 1846. By act of February 20, 1801, the court for the correction of errors was empowered to correct and redress all errors happening in the court of chancery, the supreme court, or court of probate; and the authority thus conferred included the power to reverse or affirm the judgment or decree of the court below, or to give such other judgment therein, or make such other decree as the law should require. 1 R. L. 133, §§ 7-10.

And, by a later statutory provision, it was declared that this court should have full power to correct and redress all errors that might happen in the court of chancery or in the supreme

court; and in the exercise of these powers it was required of it to examine all errors assigned or found in any record brought from the supreme court, or in any process or proceeding touching the same, and also to examine all errors assigned or found in any order or decree of the court of chancery.

By the same statute full power was given it to reverse or affirm the judgment of the supreme court, or to affirm, reverse or alter the order or decree of the court of chancery, or to give such other judgment, or make such other order or decree as justice should require. 2 R. S. 166, 167, §§ 24-27.

Section 2. Powers under constitution of 1846. The court of appeals, under the constitution of 1846, was empowered, by the provisions of the Code, to reverse, affirm or modify the judgment or order appealed from, in whole or in part, and as to any or all of the parties; and its judgment was required to be remitted to the court below, to be enforced according to law. Code, § 12.

Section 3. Present powers. The court of appeals, as now organized under the amended constitution of 1869, possesses all the powers heretofore possessed by the late court of appeals. Laws of 1870, ch. 203, § 1. See Const., art. 6, §§ 2-5; Code, § 12.

ARTICLE IV.

OFFICERS.

Section 1. Officers before 1846. The decisions of the old court for the correction of errors were reported by the State reporter. Its other officers, besides the attorney-general, and the attorneys and counselors of the court, were a clerk, a crier and a sergeant, who were appointed by and held their offices during the pleasure of the court. 1 R. S. 97; id. 109, § 28.

Section 2. Officers under constitution of 1846. Under the constitution of 1846, the clerk of the court of appeals, who was also *ex-officio* clerk of the supreme court, was elected by the people for a term of three years, and his office was required to be kept at the city of Albany. Const. 1846, art. 6, § 19.

The decisions of the court were reported by the State reporter, who was appointed for a term of three years by the governor, lieutenant-governor and attorney-general. Laws of 1848, ch. 224.

Section 3. Present officers. The present court of appeals has the appointment, and also the power of removal, of its own re-

Before 1846 — Present rule as to terms.

porter and clerk, and of such attendants as may be necessary. Const. 1869, art. 6, § 2.

As to the other officers of this court, see courts and their officers, chap. II, *ante*, 231 to 236.

ARTICLE V.

TERMS.

Section 1. Before 1846. The early court of last resort, organized under the first State constitution of 1777, was empowered by statute to hold its sessions at any time during the sitting of the legislature, on such days and at such places as the court should from time to time appoint. 1 R. L. 132, § 1.

And after the recognition of the existence of such court by the constitution of 1822 (art. 5, § 1), it was provided by statute that its sessions might be held at the capitol in the city of Albany, at such times as the court should from time to time direct; but that not more than two such sessions should be held during the recess of the legislature in any one year. 2 R. S. 164, § 7.

Section 2. Under constitution of 1846. The court of appeals, organized under the constitution of 1846, by the provisions of the Code of 1848, held six general terms. In 1849 the number of terms was reduced to five (Laws of 1849, ch. 333); and during this period the sittings of the court were migratory. Judiciary Act of 1847, art. 2, § 9. In 1851 this system was changed, the sessions of the court fixed permanently at Albany, and four terms established annually, on the first Tuesday of January, the fourth Tuesday of March, the third Tuesday of June, and the third Tuesday of September, to be continued for so long a period as the public interests might require. See Code of 1851.

In 1852 the period of holding the fourth term was altered from the third to the last Tuesday of September; and by the provisions of the Code, section 13, as amended in 1859, the judges were empowered in their discretion to appoint one of said terms in each year to be held in the city of New York.

Additional terms might also be held by the court whenever the public interests required it. Code, § 13.

Section 3. Present rule as to terms. By act of April 14, 1870, it is provided that the court of appeals, as at present organized under the amended constitution of 1869, may prescribe the times

Practice before 1846 — Present practice.

and places of holding its terms, excepting that a term thereof should be held, for the hearing of causes and matters before the court, in the senate chamber of the capitol, in the city of Albany, commencing on the first Tuesday in July, 1870. See Laws of 1870, ch. 203, §§ 1, 2.

ARTICLE VI.

RULES AND CALENDARS.

Section 1. Practice before 1846. The court for the correction of errors adopted its own rules, and the clerk of the court was required to enter the causes on the calendar in the order in which the joinder in error was filed. See Rules; 16 Johns. 604; 3 Hill, 625.

Section 2. Practice under constitution, 1846. Under the provisions of section 469 of the Code, the late court of appeals possessed the power of making its own rules, so far as the same were consistent with the provisions of the Code. But no rule so made was of any force until it had been published once a week for three weeks in the State paper at Albany. Laws of 1847, ch. 470, § 4.

The court also had the power to make provision, by general rules, as to what causes should have a preference on the calendar. Code, § 13.

Section 3. Present practice. The same powers in regard to the adoption of its rules is now possessed by the court of appeals as was formerly possessed by the late court of appeals; but the rules and practice of the latter will continue to be the rules and practice of the court of appeals, until the same shall be altered by order of the court. Laws of 1870, ch. 203, §§ 1, 2.

According to existing laws, causes which are preferred take their preference on the calendar in the following order:

1. Criminal actions.
2. Cases of probate, in which the appeal prevents the issuing of letters testamentary, or of general administration.
3. Appeals in which the sole plaintiffs or defendants are executors or administrators.
4. All other preferred cases.
5. Appeals from orders entitled to be heard as motions, pursuant to subdivision 4, of section 11, of the Code of Procedure,

Before 1846 — Under constitution of 1846.

and such appeals shall be entitled to preference as to each other, when two or more are moved at the same time in their order on the calendar, but will be heard as preferred cases only on motion days. Rule 20, court of appeals.

“On a second and each subsequent appeal to this court, or when an appeal has been once dismissed for defect or irregularity, the cause shall be placed upon the calendar as of the time of filing the first appeal, and may be noticed and put on the calendar for any succeeding term.” Code, § 13.

ARTICLE VII.

JUDGMENT.

Section 1. Before 1846. It was necessary to a decision in the old court for the correction of errors, that a majority of all the members of the court should be present at the decision; although the judgment was held to be effective, if at least ten members concurred in the decision, provided, that nineteen members were present when it was made, although the remaining nine did not vote upon the decision of the question, and had not even heard the argument of the cause. *McFarland v. Crary*, 6 Wend. 297. Where, however, the members of the court were equally divided, as to the judgment to be pronounced, the judgment of the court below was affirmed, though such formal affirmance was not regarded as conclusively settling the law on the subject. *Bridge v. Johnson*, 5 Wend. 342; *Graham on Juris.* 622.

A question once distinctly presented to this court, and passed upon by it, was not allowed to be again discussed or drawn in question; but such decision was regarded as definitely settling the law upon the subject, except as in the case of an equal division of the court above noticed, where the cause was still considered open for discussion in any future case that might be presented. *Mackie v. Cairns*, 5 Cow. 547; *Bridge v. Johnson*, 5 Wend. 342, 375.

Section 2. Under constitution of 1846. In the late court of appeals, the concurrence of five judges was necessary to a decision; and, in case five did not concur, a rehearing was necessary. But no more than two rehearings could be had, and if, on the second rehearing, five of the judges did not concur, the judgment was affirmed. Code, § 14.

Present practice — Practice before 1846.

An affirmance in such case was not, however, regarded obligatory as a precedent in settling the law for any future case of the same kind. *Morse v. Gould*, 11 N. Y. (1 Kern.) 281. But where a question was presented to the court on a second appeal, identical with the one previously before it, the court would not depart from its former decisions, although the judges were not unanimous in making it. *Oakley v. Aspinwall*, 13 N. Y. (3 Kern.) 500. And it was also held that a *motion* might be decided by a majority of the judges present, six being a quorum. *Oakley v. Aspinwall*, *supra*.

Section 3. Present practice. Under the amended constitution of 1869, article 6, section 2, any five members of the present court of appeals constitute a quorum, and the concurrence of four of them is necessary to a decision. As to the rule in the commission of appeals, see Const. 1869, art. 6, § 4.

The former rule, as to a rehearing under the provisions of section 14 of the Code, has been changed by statute. See Laws of 1870, ch. 203, § 1.

Where a question has once been passed upon in the court of appeals, and the precise question is again presented to the same court, the rule of *stare decisis* must be adhered to, and the former decision followed. *New York and New Haven R. R. Co. v. Ketchum*, 34 How. 302; S. C., 1 Trans. App. 116; 3 Keyes, 24, 363.

ARTICLE VIII.

OF REMITTITUR AND ENFORCEMENT.

Section 1. Practice before 1846. In the old court for the correction of errors, the next step to be taken after the decision of a question by the court, was to remit the record to the court below, that execution might issue upon it, according to the judgment rendered by the court above. *Graham's Prac.* 977.

The *remittitur* might be filed in vacation, and, upon filing it, the party was at once entitled to take out execution. *Lyon v. Burtis*, 2 Cow. 510; *Dale v. Rosevelt*, 1 Wend. 25. The *remittitur* being sent down to the court below, the court of errors lost all control and jurisdiction of the case, and it was then too late to correct an error, even in the judgment of the court. If, however, a *remittitur* had issued irregularly, or the party had irreg-

ularly obtained the order of the court, the *remittitur* might, in such case, be superseded. *Legg v. Overbagh*, 4 Wend. 188.

Section 2. Practice under constitution of 1846. After a judgment in the late court of appeals had been once remitted to the court below, to be enforced according to law, all jurisdiction of the cause in the former court was lost, and the only remedy was by a new appeal. *Dresser v. Brooks*, 4 How. 207; S. C., 2 N. Y. (2 Comst.) 559; 2 Code R. 130.

And the court below had jurisdiction of the cause, although the *remittitur* had not actually been filed with the clerk of the latter court. *Judson v. Gray*, 17 How. 289.

On the dismissal of an appeal, a *remittitur* was the regular process to restore the cause to the court below to be enforced. *Langley v. Warner*, 2 Code R. 97.

Section 3. Present practice. The present practice in the court of appeals, in regard to the remitting of a cause to the court below, and the enforcement of its judgments, is similar to that formerly observed in the late court of appeals. See Laws of 1870, ch. 203, §§ 1, 2; *id.* § 6.

It is prescribed by rule 14 of the present rules of the court of appeals that "the *remittitur* shall contain a copy of the judgment of this court and the return made by the clerk below, and shall be sealed with the seal and signed by the clerk of this court."

Rule 15 prescribes that, "when a decree or order shall be affirmed by the default of the appellant, the *remittitur* shall not be sent to the court below, unless this court shall otherwise direct, until ten days after notice of the affirmance shall have been served on the attorney of the appellant. Service of the notice shall be proved to the clerk by affidavit, or by the written admission of the attorney on whom it was served."

And where the judgment of the court below is reversed by default in not joining in error, the *remittitur* should not be sent to the court below until ten days have elapsed. *Lyme v. Ward*, 1 N. Y. (1 Comst.) 531; S. C., 1 Code R. 101; 7 N. Y. Leg. Obs. 10.

The intention of the above rule (15), requiring a delay of ten days after service of notice of the default before the sending down of the *remittitur*, is to protect the party against surprise, and to give him ample time to make his application for relief, or to obtain an order staying proceedings, to enable him to do so.

Remittitur—Present practice.

Latson v. Wallace, 9 How. 334. The judgment of the court of appeals is to be sent back to the inferior court to be there enforced, and must, therefore, be brought *formally* to the notice of such inferior court, and be made one of its judgments. And until the judgment of the court of appeals is incorporated in its records, no proceedings can be instituted to enforce its directions. *Seacord v. Morgan*, 17 How. 394; S. C. affirmed, 4 Abb. N. S. 249; 35 How. 487; 34 id. 626 (n).

Upon a *remittitur* being filed in the court below, all that can be done by the inferior tribunal is to formally adopt the judgment of the court of appeals as its own (*Macgregor v. Buell*, 17 Abb. 31), and take such measures as may be necessary to carry the determination of the appellate court into effect. Id.; S. C. affirmed on this point, 1 Keyes, 153; 33 How. 450.

A single judge of the court of appeals cannot stay proceedings by an *ex parte* order, absolutely, after a *remittitur* has been issued and placed in the hands of the prevailing party, and an entry of judgment, in pursuance of the *remittitur*, will be formally correct, notwithstanding such an order. *Lawrence v. Bank of the Republic*, 6 Rob. 497.

Where the court below has obtained legal possession of the *remittitur*, and has made the judgment of the appellate court its own, it has not the power to grant an order remitting back the judgment to the appellate court for the correction of errors. *Vermilye v. Selden*, 6 How. 41; S. C., 3 Sandf. 683; 9 N. Y. Leg. Obs. 83. And restitution will not be ordered by the court below, unless the *remittitur* contains a direction to that effect. *Young v. Brush*, 18 Abb. 171; S. C., 28 N. Y. (1 Tiff.) 667; 41 N. Y. (2 Hand) 620 (n); reversing S. C., 38 Barb. 294; 24 How. 70. Or unless upon notice to the party to be affected by such order. Id. The only remedy, in case of errors in the judgment, or in cases requiring amendment, after the *remittitur* has been actually filed, must be sought in the court below, or by a new appeal. *Lawrence v. Bank of the Republic*, 6 Rob. 497; *Newton v. Harris*, 1 Code R. N. S. 191; S. C., 8 Barb. 306; *Burkle v. Luce*, 1 N. Y. (1 Comst.) 239; S. C., 3 How. 236; *Martin v. Wilson*, 1 N. Y. (1 Comst.) 240. But, where the order entered on the decision of a cause does not correctly state the judgment pronounced by the appellate court, it will be amended, on motion, notwithstanding the *remittitur* has been filed in the court below. *Palmer v. Lawrence*, 5 N. Y. (1 Seld.) 455.

CHAPTER VIII.

OF THE SUPREME COURT.

ARTICLE I.

ORGANIZATION.

Section 1. Of the early court in this State. The supreme court of the State of New York was established by an act of the representative assembly of the province of New York, which was convened in the year 1691. Bradford's Col. Sess. Laws, Ed. of 1691. This act took effect for two years only, but it was renewed from time to time, until 1699, when Governor Bellamont issued an ordinance continuing the court indefinitely, and embodying the same provisions as the act of establishment, and the acts amendatory thereof. 2 Rev. Laws of 1813, app. No. 5. See 1 E. D. Smith, Introduction, 51. It has been thought by some that, in 1697, the act of establishment was permanently continued (Graham on Jurisdiction, 137), but it is probable that the authority of the court, up to a comparatively late period, had its source in the ordinance mentioned above, and that of 1704, the latter of which was issued by Governor Cornbury. 2 Rev. Laws of 1813, app. 6.

Previous to this time there had existed in the province a court of *oyer and terminer*, established by the act "to settle courts of justice, passed by the representative assembly in 1683, and which was composed of two judges commissioned by the governor, each of whom held a circuit of the court in each of the counties of the province twice a year, having associated with him four of the justices of the peace of the county, and in the city of New York the mayor, recorder and four aldermen. This court had jurisdiction of all causes, civil and criminal, triable at the common law, and was the general appellate court. Mansfield's Laws of 1683, in N. Y. State Library ; 2 Rev. Laws of 1813, app. 9. Under this act, the court thus constituted continued to be the highest court of law in the province until the passage of the colonial act above referred to, in 1691 (see Graham on Jurisdiction, 135), by which the court of *oyer and terminer* was abolished,

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but its name was retained to designate the criminal circuit of the supreme court.

As it was at first organized, the supreme court was composed of a chief judge and four assistant justices, appointed by the governor, and was held only in the city of New York (see 1 E. D. Smith, Introduction, 49), but in 1692 the act was so amended that the court should sit twice a year in the city of New York, and that one of the justices should go the circuit annually, and hold the court in each of the other counties. 3 Col. Doc. 716. By the ordinance of Governor Cornbury issued in 1704, the court was to be held four times in each year in the city of New York, and at such other places as by proclamation the governor and council might appoint. 5 Col. Doc. 409; 2 Rev. Laws of 1813, app. No. 6.

Bellamont's ordinance of continuance made no provision for the number of judges and, by common consent, only, then acted as such for about fifty years when an additional one was appointed. Rec. of Com's V. 147-224; 1 E. D. Smith, Preface, 62. Thus constituted, the court continued until the breaking out of the revolution and the adoption of the first State constitution in 1777, which recognized the court as an existing tribunal, and continued it as theretofore. Const. of 1777, 24, 25, 33. After the close of the revolution the court was held regularly at New York and Albany, circuits being held for the trial of causes at *nisi prius* in the other counties, and with a chief justice and four *puisne* judges, all of whom held their office until sixty years of age, or during good behavior, and thus the court continued until the adoption of the constitution of 1822. Graham on Jurisdiction, 141-144; 1 E. D. Smith, Introduction, 70.

Section 2. Court before 1846. The next constitution, which went into effect January 1, 1823, made considerable change in the structure of the court, for it reduced the number of justices to three—a chief justice and two justices—any of whom were empowered to hold the court. Const. of 1823, art 5, § 4. It also authorized the legislature to distribute the State into not less than four, nor more than eight circuits, for each of which a circuit judge was to be appointed, in the same manner, and for the same time, as the justices of the supreme court, and who should possess the powers of a supreme court justice at chambers, and in the trial of causes at *nisi prius*. Const. of 1823, art. 5, § 5. This was effected by the legislature soon after, by the division of the

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State into eight circuits. 2 R. S. 201 ; 1 id. 97. In each of the counties separately organized there were to be held at least two circuits and courts of *oyer and terminer*, and in the city of New York at least four terms in each year. 2 R. S. 201, § 2. The justices of the court and the circuit judges were appointed by the governor, by and with the advice and consent of the senate. Laws of 1828, ch. 137, § 2 ; id. ch. 321, § 4. They held their office during good behavior, or until they reached the age of sixty years, but might be removed by a joint resolution of the two branches of the legislature. 1 R. S. 106, § 2 ; Laws of 1828, ch. 321, § 4. Under this organization, substantially, the court remained until the adoption of the constitution of 1846.

Section 3. Court under constitution of 1846. The court was continued by the constitution of 1846 as “a supreme court, having general jurisdiction in law and equity.” Const of 1846, art. 6, § 3. The State was divided into eight judicial districts, of which the city of New York was one, and the electors of each of the several districts elected four justices of the supreme court, except the city of New York, which elected five. Const., art. 6, §§ 4, 11 ; Laws of 1852, ch. 374. Their term of office was eight years, and they were so classified that one in each district went out of office every two years. Const., art. 6, § 4. In case of a vacancy, it was filled by appointment of the governor until the next general election of justices, when it was to be filled for the residue of the unexpired term, and they might be removed by a concurrent resolution of both houses of the legislature. Const., art. 6, §§ 11, 13. From the justices having the shortest time to serve, four were selected, according to the statute, and each were required to sit in the court of appeals for one year. Laws of 1847, ch. 280, § 6. And the justice in each judicial district having the shortest time to serve, and who was not a member of the court of appeals, was the presiding justice of the supreme court. Laws of 1847, ch. 280, § 15.

Section 4. Present organization. The constitution, as amended in 1869, provided for the continuance of “the existing supreme court,” and that it should be composed of the justices then in office, and their successors. It also provided that the judicial districts of the State should remain until changed by the legislature ; but the number of the districts cannot be increased. Const., art. 6, § 6.

The court is at present composed of thirty-three justices elect-

Present organization.

ed by the people of the respective districts, for the term of fourteen years, four being elected in each district, except that composed of the city of New York, which elects five. Const., art. 6, §§ 6, 13. No justice is allowed to sit as such longer than until and including the last day of December next, after he shall be seventy years of age. Const., art. 6, § 13.

They receive as compensation the sum of \$6,000 annually, and an allowance of five dollars per day for their expenses when absent from their homes and engaged in the duties of their office. Laws of 1870, ch. 408, § 9. They can receive no fees or other perquisites of office, nor can they practice as attorney or counsel in any court of record in the State, or act as referee. Const., art. 6, § 21. They may be removed from office by a concurrent resolution of both houses of the legislature, if two-thirds of both houses concur therein; but they must have an opportunity of being heard after having been served with a copy of the charges. Const., art. 6, § 11.

Vacancies occurring otherwise than by the expiration of a term shall be filled for a full term at the next general election happening not less than three months after the vacancy occurs, and until it is so filled, the governor by and with the advice and consent of the senate, or, if the senate be not in session, the governor may appoint to fill such vacancy, and such appointment continues until and including the last day of December next after the election at which the vacancy shall be filled. Const., art. 6, § 9. A resignation of a justice of the supreme court on the 6th of November, 1871, when another person was elected on the 7th of the same month, creates a vacancy until the 31st day of December following, and no longer. This vacancy may be filled by the governor; but, on the 1st day of January following, the newly elected justice will take the office for a full term. *People ex rel. Jackson v. Potter*, 42 How. 260.

On the 25th day of May, 1870, the governor appointed from the whole bench of the supreme court a presiding justice and two associate justices, to compose a general term in each of the four departments of the State, and it his duty to designate hereafter justices to fill those positions as often as vacancies may occur. The presiding justices, when appointed, continue as such during their term of office, and the associate justices act as such for five years from the last day of December next, after their designation. Laws of 1870, ch. 408, § 3. In case of the absence

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of the presiding justice from the place appointed for holding a general term, the associate justice present, who has the shortest time to serve, may act as such; and if an associate justice be absent, the presiding justice may select some other justice of the supreme court to sit until the associate shall attend; and any justice designated to one department may sit in any other in place of any justice of such other department. Laws of 1870, ch. 408, §§ 4, 6. But no justice can sit to hear a case upon appeal to review a decision made by him, or by any court of which he was at the time a sitting member. Const., art. 6, § 8.

ARTICLE II.

JURISDICTION.

Section 1. Of the early court in this State. The act of the general assembly which established the supreme court declared that it should have cognizance of all actions, civil, criminal and mixed, as fully and amply as the courts of king's bench, common pleas and exchequer of England. 1 E. D. Smith, Introduction, 49. In and to which supreme court all and every person or persons whatsoever, should or might, if they should see meet, commence or remove any action or suit, the debt or damage laid in such action or suit being upward of twenty pounds, and not otherwise, or should, or might, by warrant, writ of error or *certiorari*, remove out of any of the respective courts of mayor and alderman, session and common pleas, any judgment, information or indictment there had or depending, and might correct errors in judgment, or revise the same if there should be just cause, provided, always, that the judgment removed should be upward of the value of twenty pounds. Graham on Jurisdiction, 136. The constitution of 1777 assumed the existence of the court and provided simply for its organization without attempting to define or limit its jurisdiction (Const. of 1777, §§ 24, 25), and so of the various legislative enactments down to the time of the new constitution of 1823. Graham on Jurisdiction, 140. The constitution of 1822-3 omitted to define its powers, assuming it to be a court of well-established common-law jurisdiction, and provided only in respect to the number of its judges and the tenure of their office, and continuing it with its original powers and juris-

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diction, subject to such alterations as the legislature might make concerning the same (Orig. Const., § 35 ; Const. of 1823, art. 7, § 13), and thus the court continued a court of general jurisdiction down to the adoption of the Revised Statutes in 1831.

Section 2. Court before 1846. The Revised Statutes, as adopted in 1831, declared that the supreme court should “possess the powers and exercise the jurisdiction which belonged to the supreme court of the colony of New York with the exceptions, limitations and additions created and imposed by the constitution and the laws of this State.” 2 R. S. 196, § 1. Thus the court continued substantially as it was originally constituted, a court of general law jurisdiction, until the adoption of the constitution of 1846.

Section 3. Court under constitution of 1846. The constitution of 1846 declared that there should be a supreme court having general jurisdiction in law and equity, and, by the judiciary act of 1847, it was provided that it should possess the same jurisdiction as had formerly been exercised by the supreme court and court of chancery, thus uniting the two tribunals, which had previously been distinct. Const. of 1846, art. 6, § 3 ; Laws of 1847, ch. 280, § 16. See, also, *Sherman v. Felt*, 2 N. Y. (2 Comst.) 186. All laws relating to the jurisdiction of the then present supreme court and court of chancery, or any court held by any vice-chancellor, were made applicable to the court then constituted, so far as the same were consistent with the constitution and judiciary act. Laws of 1847, ch. 280, § 16. See *ante*, 295.

Section 4. Present jurisdiction.

a. Original. The court has general jurisdiction, both at law and in equity. Const., art. 6, § 6. It has, as we have seen in tracing out the sources of its authority, the powers and jurisdiction of the old supreme court of the colony of New York, with the exceptions, limitations and additions created and imposed by the constitution and laws of the State (2 R. S. 196, § 1), and the old court of the colony had ample authority to take cognizance of all pleas and causes, civil, criminal and mixed, and to hear and determine the same as fully and absolutely as the courts of king's bench, common pleas and exchequer in England. 2 Rev. Laws of 1813, app. 11, 13. See *Graham on Jurisdiction*, 156.

This, being a superior court, will be presumed to have jurisdiction until the contrary appears. *Bloom v. Burdick*, 1 Hill, 130, 139. See *Wright v. Douglass*, 10 Barb. 97, 110.

Special proceedings—Habeas corpus—Certiorari—Quo warranto.

In general, in respect to *actions*, this court has original jurisdiction of all actions, both real and personal, arising within this State, and of all transitory actions, wherever the cause of action may have arisen (Graham on Jurisdiction, 162), with the exceptions which will be noticed hereafter.

In the court of *oyer and terminer* criminal jurisdiction is exercised. See Laws of 1847, ch. 280, art 5. As regards its territorial extent, the jurisdiction of this court is co-extensive with the sovereignty and jurisdiction of the State, which is fixed and defined by statute. 1 R. S. 65, § 1.

Special proceedings. There is a large class of cases in which the supreme court has original jurisdiction, derived principally, if not wholly, from statute. As these cases will hereafter be fully discussed, there will be but a brief reference to the statutes upon which they are founded. Among these are—

1. *Habeas corpus.* The supreme court, its justices and any officer authorized to perform the duties of a justice of this court in chambers, being within the county where the prisoner is confined ; or, if there is no such officer within the county, then some officer having like authority in an adjoining county may issue this writ, to inquire into the detention of any person, in the manner prescribed by statute. 2 R. S. 563.

2. *Certiorari.* This writ is a substitute for the writ of *habeas corpus* in the discretion of the court, and is prosecuted in the same manner. 2 R. S. 563.

It was formerly much used by way of appeals in civil actions, but is now superseded by appeals. Code, § 323.

There are various other provisions respecting the statutory writ of *certiorari* which it is unnecessary to notice in this place. See 2 R. S. 14, 602 ; id. 732, 736.

3. *Scire facias.* The writ of *scire facias* is abolished by the Code, and the remedies heretofore obtained thereby may be had by action. Code, § 428.

4. *Quo warranto.* This writ and proceeding, by information in the nature of *quo warranto*, has also been abolished, and an action in the nature of a *quo warranto* substituted. Code, § 428.

The action is to be brought by the attorney-general in the name of the people of the State, in the cases and in the manner prescribed by law. Code, §§ 428 to 447.

5. *Mandamus.* This remedy is one of the most important prerogatives of the court, and was derived from the laws before

Mandamus — Prohibition.

referred to, giving to the supreme court the powers of the king's bench in England.

The remedy is used to compel the performance of any duties devolving by law upon any officer, body or board acting in a public or *quasi* public character. It will lie only to give effect to a clear legal right. *The People v. Supervisors of Chenango County*, 11 N. Y. (1 Kern.) 563; *The People ex rel. Post v. Ransom*, 2 N. Y. (2 Comst.) 490. And when such right is clear, if a remedy may be had by action, that must be pursued, for a *mandamus* will not lie. *The People ex rel. Mygatt v. Supervisors of Chenango County*, 11 N. Y. (1 Kern.) 563; *Ex parte The Fireman's Insurance Company*, 6 Hill, 243; *The People v. Supervisors of Columbia County*, 10 Wend. 363; *Hull v. The Supervisors of the County of Oneida*, 19 Johns. 259; *Matter of Shipley*, 10 id. 484; *The King v. Bank of England*, Doug. 524. It has been said that "this is not universally true in relation to corporations and ministerial officers." *McCullough v. The Mayor of Brooklyn*, 23 Wend. 458. See *The People ex rel. Griffin v. Steele*, 2 Barb. 397.

The general rule has been stated to be, that, where the law enjoins a duty and no other legal remedy exists, it is the office of this court to enforce obedience to the law by *mandamus*. *Hull v. Supervisors of Oneida*, 19 Johns. 259, 262; *Ex parte Nelson*, 1 Cow. 417; *The People ex rel. Wilson v. The Supervisors of Albany*, 12 Johns. 414; *Rex v. Barker*, 3 Burr. 1265; Bac. Abr. "Mandamus," 527. But this is not an absolute rule. *The People ex rel. Doughty v. The Judges of Dutchess C. P.*, 20 Wend. 658; *The Judges of Oneida Common Pleas v. The People*, 18 id. 79, 98; *Rex v. Justices of Wilts*, 2 Chitty, 257.

Although it is not intended in this place to specify the particular cases in which the writ of *mandamus* will be issued, yet it may be laid down as a general principle that it will be allowed to enforce ministerial duties, but not to control the lawful discretion of any body or officer. *People v. Supervisors of Columbia*, 10 Wend. 363; *Hull v. Supervisors of Oneida*, 19 Johns. 259, 263; *The People ex rel. Doughty v. The Judges of Dutchess C. P.*, 20 Wend. 658; *The United States v. Lawrence*, 3 Dall. 42; *Ex parte Whitney*, 13 Pet. 404.

A *mandamus* cannot issue out of this court to a United States officer. *McClung v. Silliman*, 5 Curtis, 184; 6 Wheat. 598.

6. *Prohibition and consultation.* The writ of prohibition can

Ad quod damnum — Concurrent.

only be issued out of the supreme court, and is used to restrain inferior courts from proceeding judicially in the suits or matters for the restraint of which proper cause is shown. 2 R. S. 587. See, also, *Quimbo Appo*, 20 N. Y. (6 Smith) 531, 540; *People v. General Sessions of New York*, 3 Barb. 144; *People v. Tompkins Sessions*, 19 Wend. 154. A writ of prohibition ought not to be resorted to when another adequate remedy exists. *People v. Clute*, 42 How. 157.

Upon the decision of the matter, if a prohibition absolute be not issued, a writ of consultation is allowed directing the court or party to proceed in the suit or matter. 2 R. S. 588. See chapter Prohibition.

7. *Ad quod damnum*. This writ is issued when lands have been taken possession of for the use of the people of the State by the governor, and he is not able to agree with the owners for the purchase of the same. It contains a description of the lands, etc., and a direction to the sheriff of the county to assess, with a jury of twelve men, the damages by reason of such taking, etc. 2 R. S. 588.

8. *Corporation elections*. This court alone has power to inquire into the validity of moneyed corporations. 1 R. S. 598.

9. *Forfeitures*. An action for the recovery of property forfeited to the people of this State may be brought by the proper officer in this court. Code, § 447.

10. *Arbitrations*. Judgment, under the report of arbitrators, may be entered in any court of record. As to proceedings therein, See 2 R. S. 541.

11. *Insolvent debtors*. This court has jurisdiction of proceedings by and against insolvent debtors. 2 R. S. 3-34.

12. *Dower*. This court has jurisdiction of proceedings for the admeasurement of dower. 2 R. S. 488.

13. *Ships and vessels*. Proceedings may be had in the supreme court for the collection of demands against ships and vessels. Laws of 1862, ch. 482.

14. *Claims against deceased persons*. This court (or the county court) may control the reference of disputed claims against the estates of deceased persons, under the provisions of the Revised Statutes. 2 R. S. 88.

b. *Concurrent*. The supreme court has concurrent jurisdiction with the United States courts in certain cases, as follows: With the circuit court of the United States in all suits of a civil nature,

Appellate — In equity.

at law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and the United States are plaintiffs or petitioners, or an alien is a party ; or where the suit is between a citizen of the State where the suit is brought and a citizen of another State. Brightly's U. S. Dig. 126. The general rule in such cases, that the court first obtaining jurisdiction and being competent to administer it will retain it, is not the rule in these cases, for the act of congress confers the privilege of removing the action to the circuit court of the United States under certain circumstances. Brightly's U. S. Dig. 128.

It has also concurrent jurisdiction with the court of admiralty in certain cases of marine *torts*. But it must clearly appear that they do not fall within the *prize* jurisdiction of that court, for in such no refinement of distinction can divest the admiralty of its exclusive jurisdiction. *Percival v. Hickey*, 18 Johns. 257 ; *Novion v. Hallett*, 16 id. 327 ; reversing S. C., 14 id. 273.

c. Appellate. The supreme court is the highest court in the State combining original and appellate jurisdiction and in exercising the latter it is subject only to the revisory jurisdiction of the court of appeals. It has appellate jurisdiction to revise and correct judgments rendered by inferior courts, *to wit* : the county courts, the mayor's and recorder's court of cities, the city court of Brooklyn and the surrogate's courts. Code, § 344 ; 2 R. S. 66. Also, to revise and correct errors of the supreme court itself. Code, § 348. As to appeals in special proceedings (see Laws of 1854, ch. 270), this court may also restrain inferior courts within the limits of their jurisdiction by writs of *prohibition* and *mandamus* which have already been briefly alluded to. See *post*, "Prohibition," "Mandamus."

d. In equity. The supreme court has "general jurisdiction in law and equity" (Const., art. 6, § 6), and it has all the powers and authority of the old court of chancery. Laws of 1847, ch. 280 ; Laws of 1849, ch. 30 ; Laws of 1851, ch. 163. But by the blending of the two tribunals it has not acquired any authority which was not previously possessed by either the supreme court or chancery. *Onderdonk v. Mott*, 34 Barb. 106, *ante*, 28. The constitution and the Code have abolished every limitation in regard to the amount in controversy in actions of an equitable nature. *Sarsfield v. Van Vaughner*, 38 Barb. 444 ; S. C., 15 Abb. 65 ; reversing S. C., 14 id. 297. See *Marsh v. Benson*, 34 N. Y.

Corporations.

(7 Tiff.) 358; reversing S. C., 19 How. 415; 11 Abb. 241. See *ante*, 225, 226.

All courts of record of the State have jurisdiction in equity in so far as to permit an equitable defense to a claim at law. See *Dobson v. Pearce*, 12 N. Y. (2 Kern.) 156. But there is a class of proceedings of which chancery formerly had complete control, but which has now passed entirely to the supreme, except in those cases where the jurisdiction is conferred expressly upon other courts.

A most extensive branch of this statutory jurisdiction is in relation to —

e. Corporations. The court has general supervision over corporations established under the laws of the State of New York, and may restrain their acts, by injunction, when illegal, exercise visitatorial power, and even proceed to dissolve the corporation, in proper cases. 2 R. S. 462.

The visitatorial authority of this court extends to the following matters :

1. To compel directors, managers and other trustees and officers of corporations, to account for their official conduct in the management and disposition of the funds and property committed to their charge.

2. To decree and compel payment by them to the corporations whom they represent, and to its creditors of all sums of money and of the value of all property which they may have acquired to themselves or transferred to others, or may have lost or wasted by any violation of their duties as such trustees.

3. To suspend any such trustee or officer from exercising his office, whenever it shall appear that he has abused his trust.

4. To remove any such trustee or officer from his office upon proof or conviction of gross misconduct.

5. To direct new elections to be held by the body or board duly authorized for that purpose, to supply vacancies created by such removal.

6. In case the entire board be removed, to report the same to the governor, who, with the consent of the senate, is authorized to fill the vacancies.

7. To set aside corrupt transfers of property by trustees and officers, where those to whom the transfers were made knew the objects of such transfer.

 Infants — Guardians.

8. To restrain such transfers when the same is threatened. 2 R. S. 462.

This jurisdiction is exercised as in ordinary cases (now by action). 2 R. S. 463 ; Code, § 69.

In case of proceedings for the dissolution of corporations, the action must be brought by the attorney-general, upon leave of this court. Code, § 430 *et seq.*

In case of voluntary dissolution of a corporation. See 2 R. S. 467.

Or it may be involuntary in such cases. See 2 R. S. 465 ; Laws of 1849, ch. 226.

After dissolution the court has authority to enforce the payment of unpaid shares of stock. 2 R. S. 465 ; Laws of 1849, ch. 226.

f. Infants. This court may order the sale of infant's real estate in proper cases (2 R. S. 194, *et seq.*), and direct the application of the proceeds. *Ib.* This court has the general guardianship of infants and their estates. *People v. Porter*, 1 Duer, 711 ; 11 N. Y. Leg. Obs. 228 ; Willard's Eq. Jur. 617.

g. Custody of children. This is under the direction of the supreme court. 2 R. S. 148. See *Re Waldron*, 13 Johns. 421.

h. Idiots, lunatics, drunkards, etc. The care and custody of idiots, lunatics, persons of unsound mind and habitual drunkards, and their estates, rest with the supreme court, and the authority of the court is defined by statute. 2 R. S. 51.

i. Trusts and trustees. The court has general authority over the management of trusts, may permit trustees to resign, remove them for cause and appoint to fill vacancies. 1 R. S. 730. This jurisdiction, it seems, was possessed by the court, independent of the statute. *People v. Norton*, 9 N. Y. (5 Seld.) 176, 178.

As to the appointment of trustees see *De Peyster v. Clendinning*, 8 Paige, 295, 310 ; *King v. Donnelly*, 5 id. 47 ; and, generally, as to the jurisdiction of chancery over trusts, see 4 Kent's Com. 292.

j. Guardians. This court has in equity general power over guardians, to appoint, remove or control them. *People v. Wilcox*, 22 Barb. 178, 189 ; 14 N. Y. (4 Kern.) 575 ; *Ex parte Crumb*, 2 Johns. Ch. 439 ; *Re Andrews*, 1 id. 99.

k. Removal of causes. Any action or proceeding pending in a county court under subdivision 1 of section 30 of the Code may

Where it has no jurisdiction.

be removed to the supreme court for good cause shown. Code, § 30.

It may also remove into the supreme court any action brought under the 2d subdivision of section 33 of the Code pending in the superior court, or common pleas, of New York, and change the place of trial therein. Code, § 33.

Any action pending in a county court may be transferred to the supreme court if the county judge is incapable of acting. Code, § 30. Such cause must be heard in the first instance at a special term or circuit held in the county where the action was brought. *Ib.* Any transitory action pending in the superior court of Buffalo may be removed to the supreme court if the defendant might claim a change of venue. Laws of 1854, ch. 96, § 15; Laws of 1870, ch. 313, § 4.

1. *Where it has no jurisdiction.* Although the supreme court is a court of general jurisdiction, yet there are classes of cases of which it has no authority to take cognizance. It may be noticed in the first place that where the court has no jurisdiction, the parties cannot, by consent, confer it. *Ante*, 45.

The court has no jurisdiction of suits against ambassadors, consuls, etc., of foreign countries. *Ante*, 120, 121.

Cases of admiralty and maritime jurisdiction. Brightly's U. S. Dig 230; but see *Baker v. Hoag*, 7 N. Y. (3 Seld.) 555; *Cashmere v. De Wolf*, 2 Sandf. 379; *Frith v. Crowell*, 5 Barb. 209.

Actions against another State and offenses against the United States. *Ante*, 120, 121.

Seizures under the United States revenue laws, except where the common law can give a remedy. *Ib.*

Actions to restrain the infringement of patents. *Ib.*

Actions to recover damages for a willful injury to the person committed in another State, both parties being citizens of that State. *Malony v. Dows*, 8 Abb. 316. See *Smith v. Bull*, 17 Wend. 323.

In general it has no jurisdiction of actions relating to real estate lying in another State. *Watts v. Kinney*, 6 Hill, 82; *Mott v. Coddington*, 1 Abb. N. S. 290; S. C., 1 Rob. 267. But it may compel the specific performance of a contract for the conveyance of such lands by a party within this State. *Ante*, 17. Or decree a mortgage on such lands void. *Williams v. Ayrault*, 31 Barb. 364. See *ante*, 17.

Early courts — Before 1846.

Nor of actions against foreign corporations, except in strict compliance with the statute conferring jurisdiction. *Cumberland Coal Co. v. Sherman*, 8 Abb. 243; S. C., 30 Barb. 159.

Actions to recover penalties created by the statutes of another State are not cognizable in the courts of this State. *Bird v. Hayden*, 2 Abb. N. S. 61; S. C., 1 Rob. 383.

It has no jurisdiction of an action upon a right conferred by statutes where the statutes provide for its enforcement through other courts without mentioning the supreme court. *Dudley v. Mayhew*, 3 N. Y. (3 Comst.) 9; *ante*, 45.

Nor has it jurisdiction to restrain an action pending in a sister State. *Williams v. Ayrault*, 31 Barb. 364; *Mead v. Merritt*, 2 Paige, 402.

ARTICLE III.

POWERS.

Section 1. Early courts. Of the particular powers of the early supreme court of the State we have very little record, except that it was invested with such authority as was necessary for the conduct of its then limited business, and had power to establish rules and ordinances and regulate the practice of the court. Col. Sess. Laws (Bradford's Ed.) of 1694.

Section 2. Before 1846. The constitution of 1823 materially altered the structure of the court, and there was invested in its officers certain new powers, which we shall briefly notice.

The State was divided at this time into eight circuits, in each of which there was to be a circuit judge, and it created three justices of the court, who, beside the powers of the circuit judges, constituted a superior tribunal, with power to review the decisions of the circuit courts, the courts of *oyer and terminer*, and of all inferior jurisdictions. Const. of 1823, art. 5. It also provided that equity powers might be vested in the circuit judges. Const. of 1823, art. 5. See act of April 17, 1823, chap. 182.

Under the regulations of the Revised Statutes, the circuit courts had power to try all such issues and take all such inquests as are to be tried or taken in said courts, to record all nonsuits or defaults taken before them, and to return all proceedings had before them into the supreme court or the court directing the same. 2 R. S. 202, 203, § 13. Any judge or justice of the court might hold circuits in any part of the State. 2 R. S. 203, § 14.

Section 3. Under constitution of 1846. Under the constitution of 1846 the supreme court possessed the same powers as had previously been exercised by that court and the court of chancery (Laws of 1847, ch. 280, § 16), for, under that instrument, the court had a general jurisdiction in law and equity (Const. of 1846, art. 6, § 3), and the justices of the court exercised the same powers as had previously been exercised by justices of the supreme court, chancellors, vice-chancellors and circuit judges, so far as the same were consistent with the constitution and the provisions of the act of establishment. Laws of 1847, ch. 280, § 16. All previous laws relating to the powers of the court and judges were made applicable to the court thus constituted. Laws of 1847, ch. 280, § 22.

Justices of the peace and judges and justices of inferior courts not of record might be removed by the supreme court. Laws of 1847, ch. 280, § 25.

The court of course possessed all the powers incident to courts of general jurisdiction, but we have reserved particular notice of the powers of the judges for the article on the present power of the court, in order to avoid repetition.

Section 4. Present powers.

a. Of the court. The court, as at present constituted, possesses all the powers incident to courts of general jurisdiction, both at law and in equity, which includes the power to regulate its practice and enforce obedience to its commands within the jurisdiction of the court in the manner regulated by law. As to the power of the court to punish for contempt, see *Wicker v. Dresser*, 4 Abb. 93; S. C., 13 How. 331; *Dresser v. Van Pelt*, 15 id. 19; S. C., 6 Duer, 687. It has been held in a late case that the court has no power to punish as for contempt the disobedience of an order made by a judge out of court, unless the order was made in an action pending in the court. *The People ex rel. Geery v. Brennan*, 45 Barb. 344.

The power of the court in particular cases will not be detailed in this portion of the work, but reference may be had to the practice in the various proceedings where the powers of the court will be fully set forth, and for the powers of the various terms see "Terms."

b. Of the judges in court. Justices of the supreme court when holding terms, or as it is commonly called, *in court*, have

all the powers of the court except such as are vested in the general term.

In the first judicial district an order made at chambers has the same effect as if made in court. *Main v. Pope*, 16 How. 271.

Any justice of the court may hold special terms and circuits and hold courts of *oyer and terminer* in any county, but no judge or justice can sit at general term, or in the court of appeals, to review a decision made by him, or by any court of which he was at the time a sitting member. Const., art. 6, §§ 7, 8; Code, § 26. If associate justices of the general term are absent, the presiding justice present may select any justice of the supreme court to hold with him the general term, and the associate justices of any department have power to sit in the general term of any other department in place of any justice of such other department. Laws of 1870, ch. 408, §§ 4, 6.

c. Adjournment. After an appointment of the time and place of holding a circuit has been duly made, a judge has no authority to adjourn such court to be held at another place *Northrup v. People*, 37 N. Y. (10 Tiff.) 203; S. C., 4 Abb. N. S. 227; 4 Trans. App. 477; reversing 50 Barb. 147. But in times of epidemic disease the presiding judge of the court may make an order changing the place of session. Laws of 1866, ch. 174.

d. At chambers. The judges of the court are required at all reasonable times, when not engaged in holding court, to transact such other business as may be done out of court. Code, § 27.

Business done out of court is usually said to be done at *chambers*, and business of this character may be done in most cases, by a justice of the court at any place, as for example, at his residence or hotel. But when acting out of court he can only do what he is authorized by the legislature to do. *Bangs v. Selden*, 13 How. 374.

e. First district. Every proceeding commenced before one of the judges of the first judicial district may be continued before another with the same effect as if commenced before him. Code, § 27. The true construction of this is, that a proceeding commenced by a judge competent to institute it may be continued before any other judge competent to have commenced it. *Dresser v. Van Pelt*, 15 How. 19; S. C., 6 Duer, 687.

f. What may be done at chambers. Judgment may be given on a frivolous answer, demurrer or reply. Code, § 247. And under

What cannot be done at chambers.

that section he may make the order either absolute or conditional. *Witherspoon v. Van Dolar*, 15 How. 266. He may grant an order of arrest, an attachment, an injunction, or an order for examination in supplementary proceedings (Code, §§ 180, 218, 228, 292), and may conduct almost every interlocutory proceeding in an action. See Code, § 401.

As to the power of a judge to punish for a contempt of his orders, see *Wicker v. Dresser*, 14 How. 465; *Dresser v. Van Pelt*, 15 id. 19; *Shepherd v. Dean*, 13 id. 173; S. C., 3 Abb. 424; *Matter of Smethurst*, 4 How. 369; S. C., 2 Sandf. 724; 3 Code R. 55; *The People ex rel. Kearney v. Kelly*, 22 How. 309; S. C., 13 Abb. 459.

In the first judicial district, judges at chambers are authorized to hear all motions, except for new trials on the merits. Code, § 401. See *Main v. Pope*, 16 How. 271; *Disbrow v. Folger*, 5 Abb. 53; *Lowber v. Mayor, etc., of New York*, id. 325, except perhaps to grant a judgment, which, it seems, he cannot do, except upon a frivolous pleading. *Aymar v. Chace*, 12 Barb. 301; S. C., 1 Code R. N. S. 330.

Proceedings in that district commenced before one judge may be continued with like effect before another. Code, § 27. See *Dresser v. Van Pelt*, 15 How. 19.

g. What cannot be done at chambers. No order to stay proceedings for a longer time than twenty days can be granted by a judge out of court, except upon previous notice to the adverse party. Code, § 401. As to the force of an order granted in violation of this section, see *Hasbrouck v. Ehrich*, 7 Abb. 76, 80.

An *ex parte* order staying proceedings pending an appeal, cannot be made by a judge out of court (*Steam Nav. Co. v. Weed*, 8 How. 49), and *semble*, that no order should be made in that case, except such a one as will expire by its own limitation within twenty days. *Lottimer v. Lord*, 4 E. D. Smith, 183.

He should only grant an absolute stay until application can be made for relief (*Chubbuck v. Morrison*, 6 How. 370; *Bank of Genesee v. Spencer*, 15 How. 14), see id. 416, *n*, and only for twenty days altogether. *Sales v. Woodin*, 8 How. 349; *Anonymous*, 5 Sandf. 656; *Marvin v. Lewis*, 12 Abb. 482.

An application for an additional allowance must be made to the court. S. C. Rules. Code, § 309. See *Mann v. Tyler*, 6 How. 235; S. C., 1 Code R. N. S. 382.

A judge out of court cannot tax a bill of costs. *Van Schrick*

 What officers may perform chamber duties.

v. *Winne*, 8 How. 5. See also *Nellis v. De Forest*, 6 id. 413. But costs in an interlocutory proceeding in an action or a special proceeding, may be adjusted by the judge before whom the same may be had. Code, § 311.

If the hearing of a motion is to be before *the court*, no judge at chambers can lessen the time for such hearing by an order to show cause, except the judge before whom the hearing is to be had. *Merritt v. Slocum*, 6 How. 350.

A judge at chambers cannot extend the time for making and serving a case after the time allowed has expired. *Doty v. Brown*, 3 How. 375.

Nor can an order be made out of court which is absolute, continuing and indefinite, either to set aside or stay proceedings. *Bank of Genesee v. Spencer*, 15 How. 14, 416, *n.* Officers acting at chambers cannot review collaterally a question decided by a competent tribunal. *People ex rel. Darlington v. Orser*, 12 How. 550.

An application to review the *ex parte* order of a judge at chambers must be made to the justice who granted the order, or to the court on notice. *Cayuga County Bank v. Warfield*, 13 How. 439; Code, § 324.

Orders to show cause, made by a judge out of court, cannot be made returnable before another judge, or before the court. *Hasbrouck v. Ehrich*, 7 Abb. 76, 81; *Merritt v. Slocum*, 6 How. 350; but the hearing may be transferred to another judge. Code, § 404.

The venue cannot be changed by a judge at chambers. *Schenck v. M'Kie*, 4 How. 246.

Nor can he allow a common-law writ of *certiorari*. *Gardner v. Commissioners, etc., of Warren*, 10 How. 181.

A judge out of court has no authority to punish for contempt of an order made by him in a statutory proceeding before him unless authority so to punish is conferred by law. *The People ex rel. Geery v. Brennan*, 45 Barb. 344.

h. What officers may perform chamber duties. Prior to the constitution of 1846 there existed certain officers termed supreme court commissioners, who performed most of the duties of justices at chambers. That instrument abolished the office of commissioner, but similar powers have been conferred on certain other officers, as follows:

County judges may, within their respective counties, make

Judges of the superior court of New York — Judgments.

any order that can be made out of court, without notice, except to stay proceedings after verdict. Code, § 401.

In actions pending in the supreme court they may, within their counties, perform all the duties of a judge of this court at chambers. Code, § 403.

They may appoint a guardian *ad litem* for an infant party in any action. Code, § 115.

And order a further account when the one delivered is defective. Code, § 158.

They may conduct proceedings supplementary to execution upon a judgment of any court. Code, § 292.

But a county judge before whom such proceedings are pending has no power to try them, pending an appeal. *Bank of Genesee v. Spencer*, 15 How. 412.

Judges of the superior court of New York may perform the duties of a justice of the supreme court out of term. Laws of 1828, ch. 187, § 23.

Judges of common pleas of New York have the same powers. 3 R. S. (5th ed.) 309. Laws 1830, ch. 186, § 9.

Justices of the superior court of Buffalo. Laws of 1854, ch. 96, §§ 25, 26; Laws of 1870, ch. 313.

The same powers have been conferred upon the recorders of Albany, Hudson, Troy and Oswego (2 R. S. 217, 218; Laws of 1848, ch. 320; Laws of 1848, ch. 86; Laws of 1848, ch. 374, § 21), and upon the city judge of Brooklyn so far as relates to strictly local matters. Laws of 1870, ch. 470, § 13. See Laws of 1850, ch. 102.

And local officers elected to discharge the duties of county judge. *Seymour v. Mercer*, 13 How. 564.

These laws have been declared constitutional by the court of appeals. *Hayner v. James*, 17 N. Y. (3 Smith) 316. But see, as to proceedings supplementary to execution, *Cushman v. Johnson*, 13 How. 495; S. C., 4 Abb. 256.

ARTICLE IV.

JUDGMENTS.

Section 1. Early court. In the act of establishment of this court authority was given in civil, criminal and mixed actions, as fully and amply as that possessed by the courts of king's

bench, common pleas, or exchequer of England, and although there is no particular record, yet it is to be presumed that the judgments of this court at that time had a like effect and were enforced in a similar manner as those of the courts upon which this was modeled. See 2 Paine & Duer's Pr., "Appendix;" 1 E. D. Smith, "Introduction."

Section 2. Before 1846. By the Revised Statutes it was declared that "all judgments thereafter rendered by a court of record shall bind and be a charge upon the lands, tenements, hereditaments, real estate and chattels real of every person against whom such judgment shall be rendered," but that it should cease to bind such estate after ten years. 2 R. S. 359, § 3.

Provision was also made by statute for the docketing, canceling and enforcing of judgments of the court which it is unnecessary to detail in this place. See 2 R. S. 359, *et seq.*

Section 3. Under constitution of 1846. Under the constitution of 1846 no material alteration was made in the practice respecting judgments except those effected by the Code, which is noticed in the following section.

Section 4. Present practice. The effect of the judgments of this court is the same as formerly, but the manner of entering them is somewhat changed by the Code.

Judgments upon issues of law, or of fact, or upon confession, or upon failure to answer (except where the clerk is authorized to enter the same by the first subdivision of section 246 and by section 384, and except where it may be given at general term as provided in section 265) shall, in the first instance, be entered upon the direction of a single judge, or report of referees, subject to review at the general term, on the demand of either party, as provided by the Code. Code, § 278. But a judge at chambers cannot direct a judgment except upon a frivolous answer, demurrer or reply. *Aymar v. Chace*, 12 Barb. 301; S. C., Code R. N. S. 330.

The concurrence of a majority of the judges holding a general term is necessary to pronounce a judgment. Code, § 19. A judgment was held valid where two judges who heard the argument and one who did not, constituted the court where a judgment was pronounced, the one not present at the argument taking no part in the decision. *Corning v. Slosson*, 16 N. Y. (2 Smith) 294.

As the law now stands two of the justices of the general term

Officers — Under constitution of 1846.

may hold the court where the third is incompetent to sit. *Van Rensselaer v. Witbeck*, 3 Lans. 498. But, in such a case, both justices must concur in pronouncing any judgment.

The clerk of the court keeps a judgment book (Code, § 279) in which judgments are entered specifying the relief granted. Code, § 280. Section 282 of the Code specifies the manner of docketing judgments and their effect. Code, § 282.

ARTICLE V.

OFFICERS.

Section 1. Early court. The officers were such as were recognized in the English courts, from which the system was copied.

Section 2. Before 1846.

Clerk. Under the Revised Statutes the clerk was appointed by the court, and held office for three years. 1 R. S. 108.

State reporter. A State reporter was appointed by the lieutenant-governor, the chancellor and chief justice, and held office during their pleasure. *Ib.*

Attorneys. Counselors, solicitors and attorneys were appointed and licensed by the court under rules and regulations prescribed by the court, and they might be removed by the court, but subject to such removal they held office for life. *Ib.*

Sheriff. The sheriff was elected for three years by the electors of their respective counties. 1 R. S. 112. He appointed his own deputies and assistants. 1 R. S. 116.

Coroners. Four coroners were elected in the same manner and for the same term. 1 R. S. 112.

Commissioners of deeds were appointed by the local authorities. 1 R. S. 109. Not less than two nor more than four in each town of the State, who held office for four years. *Ib.*

Notaries public were appointed for the various cities and counties of the State by the governor and senate. 1 R. S. 98.

Section 3. Under constitution of 1846.

Clerk. Under the constitution of 1846 the office of clerk as it existed prior to that time was abolished, and the clerk of the court of appeals was made *ex officio* clerk of the supreme court. Const. of 1846, art. 6, § 19. And the clerks of the several counties were *ex officio* clerks of the supreme court in their respective counties. *Ib.* When the clerk was out of the county he could

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only act by deputy, and any act of the deputy was presumed to be performed in the absence of the clerk. *Lucas v. Trustees of Second Baptist Church and Society of Village of Geneva*, 4 How. 353. No priority could be gained by filing papers out of office hours. *Wardell v. Mason*, 10 Wend. 573. But judgments could not be entered or docketed out of legal office hours. Old Rules, 9.

Crier. The county judge of each county appointed a crier for all courts of record within his county who held office during the pleasure of the county judge. He received the same compensation and in the same manner as justices of sessions. Laws of 1855, ch. 530. It is their duty to attend all sessions of the court in the county, to make proclamation at the opening and adjournment of the court, and to call parties on recognizances, attachments, etc.

Reporter. By the constitution of 1846, all judicial decisions were declared to be free for publication by any person. Const. of 1846, art. 6, § 22.

Attorneys. The constitution provided that any male citizen of the age of 21 years, of good moral character, and who possessed the requisite qualifications of learning and ability, should be entitled to admission to practice in all the courts of the State. Const. of 1846, art. 6, § 8.

The legislature under this provision authorized the supreme court to regulate the admission of attorneys. Laws of 1847, ch. 280, § 75.

Accordingly the supreme court provided for the admission of attorneys, upon examination in open court, upon the various branches of law and practice. There were certain prerequisites to an examination which might be proved by the applicant's affidavit, *to wit*, that he was a citizen of the United States, that he was 21 years of age, and that he was a resident of the district in which he applied. He must also show by the certificate of a counselor of the court, or other reputable person, that he was a person of good moral character. Old Rules, 2. If the applicant was from another State he must comply with these provisions, or produce a certificate from a judge of the highest court of original jurisdiction in that State, to the effect that, for three years immediately preceding, such applicant had practiced as an attorney in such court and was in good standing as such. *Ib.*

Officers.

Upon admission applicants signed the rolls and took the oath of office. *Ib.*

The legislature also provided for the granting of diplomas by certain law schools, which admitted qualified persons to practice. Laws of 1860, ch. 187, § 20.

Sheriff. No change was made under the constitution of 1846 touching the office of sheriff.

Section 4. Present officers.

Clerk. Clerks of the several counties are clerks of the supreme court, with such powers and duties as may be prescribed by law. Const., art. 6, § 20.

The office hours of the clerk are, in the city of New York, from nine o'clock in the forenoon to four o'clock in the afternoon, in each day of the year except Sundays and such days as are declared by law to be holidays, and in each of the other counties of the State between the 31st of March and the 1st of October from eight o'clock in the forenoon to six o'clock in the afternoon, and between the 30th day of September and the 1st day of April from nine o'clock in the forenoon to five o'clock in the afternoon. 2 R. S. 285, § 54; amended by Laws of 1860, ch. 276.

The county clerk or his deputy, of the county in which a general term is held, must attend such term and act under the direction of the court. Laws of 1870, ch. 408, § 11.

He receives in every trial, from the party bringing it on, one dollar; on entering judgment, by filing transcript, six cents; on entering judgment, fifty cents, except in courts where the clerks are salaried officers, and in such courts one dollar. He shall receive no other fee for any service whatever in a civil action, except for copies of papers, at the rate of five cents for every hundred words. Code, § 312.

The provisions respecting deputies and in filing of papers with the clerk, noticed under section 3 of this article, are equally applicable now, but by the amendment to a former rule, judgments can be filed and entered or docketed in the clerk's office, during legal office hours, and at no other time. Rule 12. See *France v. Hamilton*, 26 How. 180.

Crier. No change has been made in the provision respecting criers, except that the crier for courts of any county shall attend the general term when the same is held within his county. Laws of 1870, ch. 408, § 11.

Officers — Terms.

Stenographer. In the city of New York the stenographer is a sworn officer, appointed by the court, holding office during its pleasure, under a salary of \$2,500. It is his duty to take full stenographic notes of all proceedings at every trial thereat. In other counties of the State the presiding justice, in his discretion, employs a stenographer, who receives such compensation as shall be certified by such justice, not exceeding five dollars per day for each day's attendance at court, and ten cents per mile for travel from his residence to the place of holding court, and a proper sum for stationery, which amount shall be a charge upon the county. It is his duty to furnish either party with a copy of the proceedings taken by him, at the rate of ten cents per folio. Code, § 256.

Reporter. The judges of the supreme court designated to hold the general term are authorized to appoint a reporter of the decisions of that court; but judicial decisions are free for publication by any person. Const., art. 6, § 23.

Attorneys. The admission of attorneys and their rights and duties have been noticed. *Ante*, 232 to 249.

ARTICLE VI.

TERMS.

Section 1. Early court. By the act of establishment, the court held a term once every six months, and such term continued eight days. Laws of 1691; Paine & Duer's Pr. App. But two sessions of the court at the city of New York having been found insufficient, Gov. Cornbury published an ordinance, in 1704, directing that the court should hold four terms a year, of five days each, in the city of New York, or at such other place as the governor and council might, by proclamation, appoint, and under this ordinance the court was held up to the time of the revolution. 5 Col. Doc. 409; 2 Rev. Laws. of 1813; App. 6.

After that time the court was held at New York and Albany, the judges performing circuits through the various counties of the State for the trial of causes at *nisi prius*. See 1 E. D. Smith, Introduction, 70.

Section 2. Before 1846. There were four terms of the supreme court held under the Revised Statutes, two at Albany, one at New York and one at Utica. 2 R. S. 196, 197. They might be held

and continued "from the commencement thereof until and including the fifth Saturday after the commencement," but no argument of a cause could be heard during the fifth week of the term without the consent of the parties. 2 R. S. 197, § 4.

If the justices did not appear at court, it was the duty of the clerk of the court to adjourn it from day to day until some one of them was present. 2 R. S. 197.

Circuits. These were simply the *nisi prius* terms of the supreme court held for the trial of issues of fact. Const. of 1823, art 5, § 5.

The Revised Statutes required that at least two circuits should be held in each county of the State, and in the county of New York four such terms in every year (2 R. S. 201), to be appointed by the respective circuit judges (2 R. S. 201), and to be held for as many days as the judges holding them should deem necessary. 2 R. S. 202.

Section 3. Under constitution of 1846. Under the constitution of 1846 and the Code adopted shortly afterward, there were held general terms, special terms and circuits.

General terms. There were, at least, four general terms held in each district annually and more might be appointed by the judges. Code, § 18.

Three justices were necessary to hold a general term. Const., of 1846, art. 6, § 6, and a majority was required to concur in order to pronounce a judgment. Code, § 19.

The judge having the shortest time to serve, and not being a member of the court of appeals, was the presiding judge. Const. art. 6, § 6; Laws of 1847, ch. 280.

Special terms. These were appointed by the judges of the respective districts, but one, at least, must be held in each county annually. Code, § 20.

Any one or more of the judges were permitted to hold special terms. Const. of 1846, art. 6, § 6.

Circuits. Under the Code circuits were appointed by the justices of the respective districts. Code, § 20, and the governor could appoint special circuits. Id. 23. The circuit could only be held by a single judge. Laws of 1847, ch. 280; Code, § 255.

Jury trials could only be had at the circuit. Code, § 255.

A circuit might be adjourned by an entry in the minutes of the court, and juries could be drawn and causes noticed for an adjourned circuit. Code, § 24.

Present general terms.

Section 4. Present terms.

a. General term. Under article 6 of the constitution, as adopted in 1869, the general terms of the supreme court were abrogated, and the State was divided into four departments, and there were directed to be held in the first department six general terms, in the second department five, in the third department eight, and in the fourth department eight, in each year. Laws of 1870, ch. 408.

Designation of justices. The governor is authorized to designate from the whole bench of the supreme court a presiding justice and two associate justices from each of said departments, to hold the general terms therein, and to designate justices to fill vacancies. When thus designated, the presiding justice shall act as such during his official term, and the associate justices for five years from the 31st day of December next after the time of his designation. Laws of 1870, ch. 408.

Justices not present at term. The following provision has been made in case of the absence of justices at the time and place of holding a general term. In case the presiding justice is absent, the associate present having the shortest time to serve acts as such, and in case one or both of the associates are absent, the presiding justice may select any justice or justices of the supreme court to hold with him such general term. Laws of 1870, ch. 408, § 4.

Powers and jurisdiction. The general term has all the powers and jurisdiction which it had under the laws and practice as they existed on the 27th of April, 1870, and all laws relating to general terms, and to the hearing of appeals from judgments pronounced and orders made within the various districts, if not inconsistent with the constitution and the acts of the legislature, apply so far as they are applicable to the present general terms, and to the judgments and orders made within the various judicial departments. Laws of 1870, ch. 408, § 5.

Entitling causes. Causes and actions pending in any general term may be entitled in the supreme court. Laws of 1870, ch. 408, § 6.

Judgments. The concurrence of two justices is necessary to pronounce a judgment, and if two do not concur a re-argument may be ordered. In case of such disagreement, when any one of the three is not qualified to sit, the cause may be directed to

Present terms.

be reheard in another department. Laws of 1870, ch. 408, § 6; Code, § 19.

Judge disqualified. No justice shall sit at a general term in review of a decision made by him, or by any court of which he was at the time a sitting member. Const., art. 6, § 8.

Original jurisdiction. The general term is not only an appellate court, but may exercise the powers of the supreme court for all purposes, except when the statute otherwise directs (*Matter of opening Seventh avenue*, 29 How. 180; *Gracie v. Freeland*, 1 N. Y. (1 Comst.) 228; S. C., 3 How. 218); but for reasons of expediency it generally refuses to act where the special term can do so.

Extraordinary terms. The governor has power to appoint extraordinary general terms. Code, § 23; Laws of 1870, ch. 408, §§ 7, 14.

Place of holding. General terms are held at the places designated for holding county courts or circuits, and if rooms, etc., are not provided the court may order the sheriff to furnish accommodations, according to section 28 of the Code. Code, §§ 24, 28; Laws of 1870, ch. 408, § 11.

Adjournment. The term may be adjourned by an entry made in the minutes of the court to be held at any future day. Code, § 24.

Appeals, where heard. All appeals or other matters proper to be brought before any general term, shall be heard and determined in the department in which the judgment or order appealed from shall be entered, or in which the matter brought up arose, unless two of the justices in such department are incapable of sitting, in which case the appeal or other matter shall be ordered to be heard in some other department. Laws of 1870, ch. 408, § 10.

Attendants. The law requires that such general term shall be attended by the sheriff of the county, or a deputy, two constables, a crier and the county clerk or his deputy, all of whom shall act under the direction of the court, and the sheriff is required to see that the court-room is kept in proper order, and must provide the court with necessary stationery during its sittings. The fees of these officers shall be audited by the comptroller and paid out of the State treasury, except the clerks, whose charges, etc., shall be a county charge. Laws of 1870, ch. 408, §§ 11, 12.

Special terms.

Section 5. Special terms.

Number of terms. At least one special term shall be held in each county annually, but the judges of each district may appoint others. Code, § 20.

Designation of justices. Any justice of the supreme court may hold special terms (Const., art. 6, § 7), and it is the duty of the governor, whenever the public interest shall require it, to designate one or more judges of the superior court or court of common pleas of the city of New York to hold special terms of the supreme court in that city; the designation shall be in writing and specify the time and place of holding such special term. Laws of 1870, ch. 408, § 8.

Extraordinary terms. The governor may also, when in his judgment the public good requires it, appoint extraordinary special terms and designate the justice who shall hold the same. Notice of such term must be given. Laws of 1870, ch. 408, § 14; Code, § 23.

Adjournment. Special terms may be adjourned by an entry in the minutes of the court, to be held at a future day, at the chamber of any justice residing in the district, and then adjourned, from day to day, as the justice holding the same may order and direct. Code, § 24.

Inability of judge. In case of the inability, for any cause, of a judge assigned for that purpose to hold a special term, any other judge may do so. Code, § 26.

Jurisdiction and powers of special term. There is but one supreme court, and it is that which acts whether at general or special term. The special term may hear all questions that could come before the general term, except upon appeal. *Corning v. Powers*, 9 How. 54; *Mason v. Jones*, 1 Code R. N. S. 335.

Issues of fact, when triable by the court, and issues of law, may be tried at special term. Code, § 255.

Non-enumerated motions, unless otherwise directed by law, must be heard at special term. Rule 47.

Special term has power to hear and grant a motion for a new trial upon a case made, after verdict, and even after judgment has been entered upon the verdict. *Folger v. Fitzhugh*, 41 N. Y. (2 Hand) 228.

An application may be made at special term to amend a judgment of the general term. *De Agreda v. Mantel*, 1 Abb. 130.

It may set aside the order of a referee, which he had no au-

Circuits.

thority to make. *Union National Bank of Troy v. Bassett*, 3 Abb. N. S. 359; *Union Bank v. Mott*, 18 How. 506.

But it cannot vacate a judgment entered on the report of a referee on the ground that it is erroneous in law. *Dana v. Howe*, 13 N. Y. (3 Kern.) 306.

Special term may allow an amendment which inserts in a pleading a new cause of action or a new defense. *Ford v. Ford*, 35 How. 321; S. C., 53 Barb. 525.

It may open a default taken at special term or relieve from a judgment taken irregularly at general term, where the point was not before the court. *Ayres v. Covill*, 9 How. 573. See *Corning v. Powers*, 9 id. 54.

But it cannot dismiss an appeal to the general term. *Harris v. Clark*, 10 How. 415; *Barnum v. Seneca County Bank*, 6 id. 82. Nor should it attempt to review any actual determination of the general term. *Ayres v. Covill*, 9 How. 573; *Corning v. Powers*, id. 54.

Section 6. Circuits. No alteration has been made in the organization of the circuit. See *ante*, 315, section 3, of this article, except that the governor may appoint, in writing, extraordinary circuits and designate the time and place of holding the same, and the justice who shall hold the same. Laws of 1870, ch. 408, § 14.

He may, also, whenever the public interest requires, designate one or more of the judges of the superior court or court of common pleas, of the city of New York, to hold circuits of the supreme court in that city. Such designation must be in writing and specify the time and place of holding such circuit. *Id.*, § 8.

When a case or bill of exceptions shall be made in any cause tried at such circuit, the same shall be settled before the judge holding the court, and the review shall be had in the same manner as if the term had been held by a justice of the supreme court. *Ib.* Judgment, on failure to answer, may be applied for at a circuit in the county in which the cause was triable. Rule 33.

But it seems that hardly any step can be taken in a cause at the circuit except to try, refer or grant a new trial on the judge's minutes. *Mann v. Tyler*, 6 How. 236; S. C., 1 Code R. N. S. 383.

Rules and calendars.

Section 7. Chambers. No alteration has been effected in the practice at chambers since the adoption of the new article of the constitution, and we have noticed the powers and duties of justices at chambers in a previous chapter. See *ante*, 306 to 309, art. 3, of this chapter.

ARTICLE VII.

RULES AND CALENDARS.

Section 1. Early courts. In the act of establishment the court was authorized to make and establish such rules and orders as they might see fit "for the more orderly practicing and proceeding in the said court" (Act of 1691, 2 Paine & Duer's Prac. App. ; see 1 E. D. Smith, Introduction), and the court has always possessed and exercised this power.

Section 2. Present practice. A convention of the general term justices, the chief judges of the superior courts of cities, the chief judge of the court of common pleas of the city of New York and of the city court of Brooklyn, were authorized to meet at the capitol in the city of Albany, and on the first Wednesday in August, 1870, and every two years thereafter, to revise, alter, abolish and make rules which shall be binding upon all courts of record, so far as they may be applicable. A majority of the said justices shall constitute a quorum to do business, whether the chief judges are present or not, but each justice and chief judge is entitled to vote on all matters that come before the convention. Laws of 1870, ch. 408, § 13.

The various courts of record and general terms may make such further rules in regard to the transaction of business before them respectively, not inconsistent with the general rules, as they in their discretion may deem necessary. Rule 96.

Calendars. The clerk prepares a calendar for the various terms of the court from notes of issue filed with him. Code, § 256 ; Rule 48.

Issues, how disposed of. Issues on the calendar are disposed of in the following order, unless the court otherwise directs: 1. Issues of fact to be tried by a jury ; 2. Issues of fact to be tried by the court ; 3. Issues of law. Code, § 257. At general term, causes entitled to a preference are placed upon a separate calendar. Rule 48.

Appeals.

ARTICLE VIII.

APPEALS.

Section 1. Early courts.

a. Appeals from. In the early practice of this court, appeals lay from any judgments above the value of £100, to the governor and council, and, thence to their majesty's council, from judgments above the value of £300. Act of 1691, and acts amendatory thereto; 2 Paine & Duer's Pr. App; 1 E. D. Smith, Introduction. But, under the constitution of 1777, a court of last resort was erected, to which appeals were had. 1 E. D. Smith, Introduction, 70.

Appeals to. Appeals lay to the supreme court from judgments above the value of £20, rendered in the courts of mayor and aldermen and courts of common pleas. *Ib.*

Section 2. Before 1846.

Appeals from. Under the Revised Statutes, appeals from chancery, and writs of error from the supreme court, lay to the court of errors, which was empowered to reverse or affirm the judgments of the supreme court, or decrees in chancery, or give such other judgments as the law might require. 2 R. S. 166.

Appeals to. For an error of law or of fact, a writ of error lay from every court of common pleas and from the superior court of the city of New York. Laws of 1828, ch. 137, § 19. See 1 Paine & Duer's Pr. 229; Laws of 1830, ch. 24.

Section 3. Under constitution of 1846.

a. Appeals from. In proper cases an appeal could be taken from the general term of the supreme court to the court of appeals. Code, § 11.

Appeals to. Appeals might be taken to the general term of the supreme court, from the judgments rendered by a county court, or by the mayor's courts, or the recorder's courts of cities. Code, § 344.

An appeal lay upon the law, from judgments entered in the supreme court, upon the report of referees, or upon the direction of a single judge of the same court, in all cases, and upon the fact, when the trial was by the court or referees. Code, § 348.

An appeal also lay from any order affecting a substantial right,

Present practice.

made by a county court or a county judge, in any action or proceeding. Code, § 344.

Also, from an order made at special term by a single judge of this court, by a county or a special county judge, or by a recorder or by any recorder's court of any city in any stage of the action, including proceedings supplementary to execution, and might be reviewed in the following cases:

1. When it granted or refused, continued or modified a provisional remedy.
2. When it granted or refused a new trial, or when it sustained or overruled a demurrer.
3. When it involved the merits of the action, or some part thereof, or affected a substantial right.
4. When the order in effect determined the action and prevented a judgment from which an appeal might be taken.
5. When the order was made upon a summary application, in an action after judgment, and affected a substantial right. Code, § 349.

Section 4. Present practice. The judiciary article of the constitution, as adopted in 1869, preserves the right of review to the court of appeals (Const., art. 6, § 6), but there has been no material change in the practice on appeals as it existed under the Code. See preceding article.

CHAPTER IX.

THE SUPERIOR COURT OF NEW YORK CITY.

ARTICLE I.

FORMER ORGANIZATION OF THE COURT.

Section 1. Historical sketch of the court. "The superior court of the city of New York" was organized by an act of the legislature, passed March 31, 1828 (Laws of 1828, ch. 137), and originally consisted of a chief justice and two associate justices (Laws of 1828, ch. 137, § 1), who were appointed by the governor, with the consent of the senate, and who held office for the term of five years (Laws of 1828, ch. 137, § 2), subject, however, to removal by the senate for cause shown, upon the recommendation of the governor. Laws of 1828, ch. 137, § 2; 1 R. S. 106, § 4. All vacancies in the offices of the judges were filled by appointment of the governor, with the concurrence of the senate. Laws of 1828, ch. 137, § 2. The compensation of the judges was to be fixed by the mayor, aldermen and commonalty of the city of New York, at a sum not less than two nor more than four thousand dollars per year, and was to be paid out of the city treasury. Laws of 1828, ch. 137, § 7.

The court possessed a seal and was organized as a court of record. Laws of 1828, ch. 137, §§ 8, 10.

The terms were held at the city hall on the first Monday of every month, and were continued and held from that time, every business day, until and including the last Saturday of the month. But the judges were at liberty to adjourn the court before that time, or from day to day, in their discretion. Laws of 1828, ch. 137, §§ 3, 4.

At its organization the court had jurisdiction to hear, try and determine all local actions arising in the city and county of New York, and all transitory actions, although the same did not arise therein, and to grant new trials. Laws of 1828, ch. 137, § 5. The court remained under this organization until the adoption of the constitution of 1846, which authorized the legislature to regulate its organization (Const. of 1846, art. 6, § 14), and to

Present organization.

direct the times and manner of the election of judicial officers therefor. Const. of 1846, art. 6, § 18. It also provided that the court should remain under its then existing organization until the legislature should otherwise direct. Const. of 1846, art. 14, § 12.

The legislature, by an act passed May 12, 1847, provided for the *election* of three justices of the superior court at the first judicial election under the constitution of 1846, and the same act extended the term of office to six years. Laws of 1847, ch. 255.

In 1849, the legislature provided for the election of three additional justices of the superior court, to be chosen by the electors of the city of New York at the charter election, to be held on the second Tuesday in April, 1849 (Laws of 1849, ch. 124), and declared that, from the first day of May, 1849, the superior court should consist of six judges. Code, § 40. The term of office of two of these judges expired every two years. Code, § 43. It was made the special duty of the justices added to the court in 1849, to devote their time for two years to the disposal of causes transferred from the supreme court (Laws of 1849, ch. 124; Code, § 47); but, by an act subsequently passed, those judges were at liberty to devote themselves to any department of court business before the expiration of the two years. Laws of 1851, ch. 2.

ARTICLE II.

PRESENT ORGANIZATION.

Section 1. Number of judges. By the sixth article of the constitution, as adopted in 1869, the superior court of the city of New York is continued and is hereafter to be "composed of the six judges in office at the adoption of this article and their successors." Const., art. 6, § 12.

Section 2. Chief judge. A chief judge is to be appointed by the justices of the court, from their own number, who is to act as such during his official term. *Ib.*

Section 3. Term of office. The judges are to be chosen by the electors of the city of New York, and they hold their office for fourteen years, from and including the first day of January next after their election; but no person shall act as such judge

longer than until, and including the last day of December next, after he shall be seventy years of age. Const., art. 2, § 13.

Section 4. Compensation. The compensation of the judges is to be established by law, and shall not be diminished during their term of office. Const., art. 6, § 14. They are not allowed to receive fees for any service. Code, § 35.

Section 5. Certificate of age, etc. Each judge is required, within ten days after entering upon his duties, to make and sign a certificate, which shall be filed in the office of the secretary of State, setting forth the age of such officer, and the time when his official term will expire. Laws of 1870, ch. 86, § 8.

Section 6. Vacancies, how filled. Successors to those whose terms of office expire by the effluxion of time, or the disability of age, shall be chosen at the general election preceding the expiration of such term. Laws of 1870, ch. 86, § 9. Vacancies occurring from any other cause are filled at the next general election, happening not less than three months after such vacancy occurs; and until the vacancy is so filled, the governor, with the concurrence of the senate, or, if the senate is not in session, the governor may appoint to fill such vacancy, and such appointment continues to and including the last day of December next after the election at which the vacancy shall be filled. Laws of 1870, ch. 86, § 9; Const., art. 6, § 9. See *ante*, 294.

Section 7. Removals. Judicial officers of this court may be removed by the senate on the recommendation of the governor, if two-thirds of all the members elected to the senate concur therein; but the cause of removal must be entered on the journals, the party complained of must be served with a copy of the charges against him, and have an opportunity of being heard thereon. Const., art. 6, § 11.

ARTICLE III.

JURISDICTION OF THE COURT—ITS ORIGINAL JURISDICTION.

Section 1. Cause of action arising in the city. The superior court of New York city has jurisdiction of the following actions, when the cause, or some part thereof, has arisen in such city:

1. For the recovery of a penalty or forfeiture imposed by statute.

2. Against a public officer or person specially appointed to

execute his duties, for an act done by him in virtue of his office, or against a person who, by his command or in his aid, shall do any thing touching the duties of such officer. Code, §§ 33, 124; Wait's Code, 54 to 59.

Section 2. Subject of action situated in the city. It also has jurisdiction of the following actions where the subject, or some part thereof, is situated within such city:

1. Actions for the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest, and for injuries to real property.
2. For the partition of real property.
3. For the foreclosure of a mortgage of real property.
4. For the recovery of personal property distrained for any cause. Code, §§ 33, 123.

Section 3. Defendants residing in the city. The superior court has jurisdiction of all other actions —

1. Where all the defendants reside, or are personally served with the summons, within the city of New York.
2. Where one or more of several defendants, jointly liable on contract, reside or are personally served with the summons within the city of New York. Code, § 33.

Section 4. Actions against corporations. Its jurisdiction extends to actions against corporations —

1. Created under the laws of this State, and transacting their general business, or keeping an office for the transaction of business, within the city of New York, or established by law therein; or,

2. Created by or under the laws of any other State, government or country.

(1.) For the recovery of any debt or damages, whether liquidated or not, arising upon contract made, executed or delivered within this State.

(2.) Upon any cause of action arising within this State. Code, § 33.

3. Created by or under the laws of any other State, government or country —

(1.) By a resident of this State for any cause of action.

(2.) By a plaintiff not a resident of this State, when the cause of action shall have arisen or the subject of the action shall be situated within the State. Code, § 427.

Transferred cases — Non-residents.

Section 5. Under the constitution. The 6th article of the constitution, as adopted in 1869, declares that this court shall be continued with such powers and jurisdiction as it now possesses, "and such further civil and criminal jurisdiction as may be conferred by law." Const., art. 6, § 12.

Section 6. Transferred cases. All civil suits, at issue, at the time of the passage of the Code, that, from and after May 1, 1849, were placed upon the calendar of the supreme court at any general or special term thereof, to be held in the city of New York, and which were in readiness for hearing upon questions of law only, or were equity cases, were allowed to be transferred to the superior court to be heard at a general term thereof; and the superior court has the same jurisdiction over every such action as the supreme court might have exercised if the cause had remained in that court. Code, §§ 47, 48.

Section 7. Non-residents. The superior court has jurisdiction of the actions enumerated in sections 1 and 2 of this article, without reference to the residence of the parties. *Porter v. Lord*, 4 Abb. 43; S. C., 13 How. 254; 4 Duer, 682; *Varian v. Stevens*, 2 id. 635; *Nichols v. Romaine*, 9 How. 512; S. C. affirmed, 3 Abb. 122. And when the case belongs to either of those classes, or when one of several defendants, jointly liable on contract, resides in the city, this court has jurisdiction of the action and the summons may be served upon the defendants in any part of the State. *Porter v. Lord*, 4 Duer, 682; S. C., 13 How. 254; 4 Abb. 43. See *Johnson v. Ackerson*, 40 How. 222; 3 Daly, 430.

Where only one of three non-resident defendants, severally liable, was served with the summons within the city of New York, the plaintiff was permitted to discontinue as to the others and proceed to judgment against the one served. *McKenzie v. Hackstaff*, 2 E. D. Smith, 75; *Bates v. Reynolds*, 7 Bosw. 685. When the court has jurisdiction of the action, a voluntary appearance, without service of process, will give jurisdiction of the person. *Watson v. The Cabot Bank*, 5 Sandf. 423; affirmed by the court of appeals. See 4 Duer, 606(n); *Mahaney v. Penman*, 4 Duer, 603; S. C., 1 Abb. 34.

If a defendant is served with process out of the jurisdiction of the court and appears in the action, he will be deemed to have waived the defect, and will not be allowed afterward to raise the objection. *Smith v. Dipeer*, 2 Code R. 70. See *Ayres v. Western Railroad Corp.*, 48 Barb. 132; S. C., 32 How. 351.

Although service upon non-residents within the city of New York confers jurisdiction, yet the court will not sustain a service upon a defendant who has been brought within the jurisdiction by fraud and misrepresentation. *Goupil v. Simonson*, 3 Abb. 474; *Carpenter v. Spooner*, 2 Sandf. 717; S. C., 2 Code R. 140; affirmed on appeal, 3 Code R. 23. See *Benninghoff v. Oswell*, 37 How. 235; *Metcalf v. Clark*, 41 Barb. 45.

Section 8. Concurrent jurisdiction. The jurisdiction of the New York superior court is co-equal with that of the supreme court, provided the defendants, or either of them, reside, or can be served with process within the city and county of New York. *McIvor v. McCabe*, 16 Abb. 319; S. C., 26 How. 257; *Porter v. Lord*, 4 Abb. 43; S. C., 13 How. 254; 4 Duer, 682; *Bates v. Reynolds*, 7 Bosw. 685.

Its jurisdiction also extends to the determination of a lien for salvage, in common with the United States court and the superior court. *Cashmere v. De Wolf*, 2 Sandf. 379; *Cashmere v. Crowell*, 1 Sandf. 715. See *Baker v. Hoag*, 7 N. Y. (3 Seld.) 555; *Brookman v. Hamill*, 43 N. Y. (4 Hand) 554.

Section 9. Specific performance. This court has general equity jurisdiction, and may, therefore, compel the specific performance of a contract, by a religious corporation, to convey real estate. *Bowen v. Irish Presbyterian Congregation*, 6 Bosw. 245.

Section 10. Divorce. It also has jurisdiction of actions for divorce on the ground of adultery. *Forest v. Havens*, 38 N. Y. (11 Tiff.) 469; *Forrest v. Forrest*, 25 N. Y. (11 Smith) 501; affirming S. C., 4 Duer, 102.

ARTICLE IV.

WHEN IT HAS NO JURISDICTION.

Section 1. Actions against the mayor, etc. The superior court has no jurisdiction of actions against the mayor, aldermen and commonalty of the city of New York. Laws of 1867, ch. 586, § 6.

Section 2. Land out of the city. Nor has it jurisdiction of an action to compel the conveyance of land situate without the limits of the city of New York. *Ring v. McCoun*, 10 N. Y. (6 Seld.) 268; affirming S. C., 3 Sandf. 524. Nor to set aside as fraudulent a conveyance of land situated in another State. *Ben-net v. Erving*, 4 Rob. 671; S. C., 32 How. 384.

Section 3. Against corporations. It has no jurisdiction to wind up the affairs of a corporation and distribute its effects through a receiver, nor to inquire into the validity of its election of officers, and to restore one unlawfully displaced. *Brahe v. Pythagoras Association*, 11 How. 44; S. C., 4 Duer, 658. See *Kattenstroth v. The Astor Bank*, 2 Duer, 632. Nor can it appoint a receiver of a foreign corporation. *Day v. United States Car Spring Co.*, 2 Duer, 608.

Section 4. Commissions of lunacy. This court cannot issue commissions in cases of lunacy, nor can it make any decree affecting the lunatic's estate. *Matter of Brown*, 1 Abb. 108; S. C., 4 Duer, 613.

Section 5. Commission to take testimony. The court will not compel the attendance of witnesses to be examined under a commission from a foreign court. *Matter of Jay*, 5 Sandf. 674.

Section 6. Statutory jurisdiction. As the superior court is a court created by special statute, of local and limited powers, it is not expedient to transcend the jurisdiction expressly defined by statute. *Matter of Jay*, 5 Sandf. 674.

Section 7. Proceedings against vessels. Proceedings *in rem* against vessels cannot be maintained in the superior court. The statute authorizing such proceedings in State courts (Laws of 1862, ch. 482) is unconstitutional and void. *Bird v. Steamboat Josephine*, 39 N. Y. (12 Tiff.) 19; S. C., 6 Trans. App. 5; reversing S. C., 50 Barb. 501. See *Ferran v. Hosford*, 54 id. 200; *Brookman v. Hamill*, 43 N. Y. (4 Hand) 554. As to a lien for labor and materials, see *Sheppard v. Steele*, id. 52; *Delany v. Brett*, 4 Rob. 712; 1 Abb. N. S. 421.

Section 8. Attachment against non-residents. Under the second subdivision of section 33 of the Code, this court has no jurisdiction whatever, unless the defendant is a resident, or, if a non-resident, is personally served with the summons within the city; hence, if an attachment is issued in an action against a single non-resident defendant, and a levy is made thereunder before the service of the summons upon such defendant within the city, the levy so made is unauthorized and void. *Kerr v. Mount*, 28 N. Y. (1 Tiff.) 659; *Zeregal v. Benoist*, 33 How. 129; S. C., 7 Rob. 199; *Fisher v. Curtis*, 2 Sandf. 660; S. C., 2 Code R. 62; Id. 63, note. See *Corson v. Ball*, 47 Barb. 452. See summons and its service.

ARTICLE V.

POWERS OF THE COURT AND OF THE JUDGES.

Section 1. Under the constitution. The superior court of the city of New York is continued, with the powers and jurisdiction it now has, and the legislature is authorized to enlarge such powers and jurisdiction. Const., art. 6, § 12.

Section 2. Process in other counties. Subpœnas issuing from this court are obligatory upon any person duly served therewith in any part of the State, and the court has power to compel obedience thereto by attachment. Laws of 1828, ch. 137, § 14.

It has power, also, to compel the return of an execution issued to a foreign county, upon one of its judgments docketed there. *Shindler v. Blunt*, 1 Sandf. 683.

Section 3. Unwilling witness. The court may issue a summons, requiring any witness whose deposition is necessary upon a motion or other proceeding, to attend before a judge thereof and make such deposition, and obedience to such summons may be enforced as in case of a subpœna. Laws of 1840, ch. 276, § 3.

Section 4. Discovery of papers, etc. This court may compel the discovery of books, papers, etc., by the parties to actions, in the same manner as the supreme court. *Gould v. McCarty*, 11 N. Y. (1 Kern.) 575; 2 R. S. 207, § 21; Laws of 1841, ch. 38; *Moore v. Pentz*, 2 Sandf. 664; Wait's Code, 57, 735 to 739.

Section 5. Appointment of terms. The court may appoint the general and special terms thereof, prescribe their duration, and from time to time alter such appointment. Code, § 35.

Section 6. Appointment of officers; rules. The court is authorized to appoint a clerk (1 R. S. 108, § 14; Laws of 1828, ch. 137, § 9), and a crier. Code, § 39. It may also make rules for the transaction of its business. Supreme Court Rules, 96.

ARTICLE VI.

POWERS OF THE JUDGES.

Section 1. Chamber business. The justices of this court are authorized to perform all the duties which the justices of the supreme court, out of term, are authorized to perform. Laws of 1828, ch. 137, § 23.

Either of the judges of the court may hold the same for the hearing of non-enumerated motions, and may exercise such power at chambers. Laws of 1830, ch. 24, § 2; Laws of 1828, ch. 137, § 6.

Section 2. As supreme court commissioners. Although the office of supreme court commissioner is abolished, yet the powers incident to it are preserved to the judges of this court. Laws of 1847, ch. 255, § 7; 2 R. S. 280, 281; *Renard v. Hargous*, 13 N. Y. (3 Kern.) 259; affirming S. C., 2 Duer, 540.

Acting as such they may issue attachments against absconding, concealed or non-resident debtors under the authority of the Revised Statutes. *Renard v. Hargous*, 13 N. Y. (3 Kern.) 259; affirming S. C., 2 Duer, 540; *Nash v. People*, 36 N. Y. (9 Tiff.) 609, 613.

They may issue writs of *habeas corpus*. *The People v. Porter*, 1 Duer, 709; *The People v. Lemmon*, 5 Sandf. 681; 2 R. S. 564, § 23.

Section 3. Different judges. Any proceeding commenced before one judge of this court may be continued before any other judge thereof. Laws of 1840, ch. 276, § 2. See *Dresser v. Van Pelt*, 15 How. 19; 6 Duer, 687; *Holstein v. Rice*, 15 Abb. 307; 24 How. 135; *Hilton v. Patterson*, 18 Abb. 245.

Section 4. Holding terms of supreme court. The constitution, as amended in 1869, authorizes the legislature to detail judges of the superior court to hold circuits and special terms of the supreme court, in the city of New York, as the public interest may require. Const., art. 6, § 12; Laws of 1870, ch. 408, § 8.

ARTICLE VII.

JUDGMENTS, HOW RENDERED.

Section 1. Upon appeal. Judgments upon appeal in this court must be given at the general term (Code, § 37), and the concurrence of two judges is necessary to pronounce such judgment. Code, § 38. If two do not concur, the appeal must be reheard. *Ib.*

If the argument is heard by three judges, a judgment rendered by two, without consultation with the third, will be allowed to stand, but a consultation in such cases is always preferable. *Parrott v. The Knickerbocker Ice Co.*, 38 How. 508; 8 Abb. N. S. 234; 1 Sweeny, 533.

Officers — Terms.

Section 2. Other judgments. All other judgments must be given at the special term. Code, § 37

ARTICLE VIII.

OFFICERS.

Section 1. Clerk. The court is authorized to appoint a clerk, whose duty is to keep an office at the city hall, and attend the court and officiate as clerk thereof. 1 R. S. 108, § 14; Laws of 1828, ch. 137, § 9.

Section 2. Crier. A crier shall be appointed by the court, to hold his office during the pleasure of the court, and to receive a salary which shall be fixed by the supervisors of the city of New York, and paid out of the county treasury. Code, § 39.

Section 3. Attorneys. Attorneys when admitted to practice by the supreme court are entitled to all the privileges of this court. Laws of 1847, ch. 280, § 75; 4 Stat. at Large, 577, § 75.

ARTICLE IX.

TERMS.

Section 1. General term.

a. Appointment. The court has power to appoint general and special terms thereof, to prescribe their duration, and to alter such appointment from time to time. Code, § 35.

b. Rooms, etc. The supervisors of the county of New York shall provide the court with rooms, attendants, fuel, lights and stationery, suitable and sufficient for the transaction of its business. If the supervisors neglect to do so, the court may order the sheriff to supply the want, and his expenses in so doing become a county charge. Code, §§ 28, 51.

c. Number of judges. Any two of the justices of the superior court may hold a general term thereof. Code, § 46.

d. Number of terms. One or more general terms may be held at the same time. Code, § 46.

e. Jurisdiction. The general term alone has the power to render a judgment upon an appeal (Code, § 37), and it can exercise only an appellate jurisdiction, except in the cases pro-

Removal of causes into the supreme court.

vided for by section 265 of the Code. *Matter of Walker*, 2 Duer, 655; *Mather's Case*, 14 Abb. 45.

Section 2. Special term.

a. By whom held. The special term of this court may be held by any one of the judges thereof. Code, § 46. One or more special terms may be held at the same time. *Ib.*

b. Appointment of terms, etc. The provisions noticed above for the appointment of terms, and the providing of terms, etc., for the general term of this court, are equally applicable to the special term. Code, §§ 35, 51, 28.

c. Jurisdiction. All judgments except judgments upon appeal must be given at the special term. Code, § 37.

Section 3. Trial term.

The powers and offices of the trial term of this court are identical with those of the "circuit" in the supreme court.

ARTICLE X.

REMOVAL OF CAUSES INTO THE SUPREME COURT, AND FROM THE SUPREME COURT.

Section 1. Removal of causes into the supreme court.

a. What actions may be removed. Any action brought under subdivision 2 of section 33 of the Code, and pending in the superior court of the city of New York, may be removed into the supreme court, and the place of trial therein may be changed by the said supreme court as if such action had been commenced in that court. Code, § 33, subd. 2.

b. How removed. Such removal and change of place of trial is effected by order made in the supreme court upon motion. Upon filing a certified copy of such order in the office of the clerk of the superior court, such cause shall be deemed to be removed into the supreme court, Code, § 33, subd. 2.

c. Proceedings after removal. The supreme court shall proceed in such action as if the same had been originally commenced therein, and the clerk with whom such order of removal is filed must forthwith deliver to the clerk of the county in which, by such order, the trial is directed to be had, to be filed in his office, all process, pleadings and proceedings relating to such cause. Code, § 33, subd. 2.

d. Removal discretionary. The power of the supreme court,

Removal of causes into the superior court — In general.

to remove into that court a cause pending in the superior court, is a discretionary power, and not one giving a party applying therefor a strict right. It should only be exercised upon good cause shown. *Campbell v. Butler*, 4 Abb. 55.

e. Motion papers. On the motion for removal the papers should be entitled in the court from which the removal is sought. *Miller v. Dows*, 2 How. 98.

Section 2. Removal of causes into the superior court.

a. Causes to be transferred. It is provided that all civil suits at issue at the time of the passage of the Code, that, after the 1st day of May, 1849, shall be placed upon the calendar of the supreme court at any general or special term thereof, to be held in the city of New York, and which shall be in readiness for hearing on questions of law only, or are equity cases, may be transferred to the superior court of that city. Code, § 47.

The authority conferred by this provision to transfer equity causes to the superior court is confined to equity cases commenced prior to July, 1848, and does not extend to actions under the Code where the relief sought is of an equitable nature. *Giles v. Lyon*, 4 N. Y. (4 Comst.) 600; S. C., 1 Code R. N. S. 257.

b. How transferred. Such actions are to be transferred by an order of the supreme court, or by the judge holding the special term at which the cause was to have been heard. Code, § 47.

c. After removal. The causes, on removal, are to be heard at the general term of the superior court (Code, § 47), and that court has full jurisdiction over every cause so transferred, and can exercise the same powers in relation thereto as the supreme court might have exercised if the suit had remained therein. Code, § 48.

ARTICLE XI.

RULES.

Section 1. In general. The transaction of business before this court is regulated by the rules of the supreme court, so far as they are applicable to this court. Laws of 1870, ch. 408, § 13. These rules were adopted by a convention of the general term justices of the supreme court, the chief judges of the superior courts in cities, the chief judge of the New York common pleas, and the chief judge of the city court of Brooklyn; and a con-

Appeals to the court of appeals.

vention of these judges is to be held every two years hereafter, to revise, alter, abolish or make rules, which shall be binding upon this court so far as they are applicable to its practice. *Ib.*

But, in addition to these rules, the superior court is authorized to make other rules, adapted to the necessities of its practice, as it may, in its discretion, deem necessary. The rules so adopted, however, must not be inconsistent with the general rules of the supreme court as adopted in convention. Supreme Court Rules, 96.

The general term may make further rules for the transaction of business before it. *Ib.*

ARTICLE XII.

APPEALS.

Section 1. Appeals to the court of appeals. Every appeal from the general term of the superior court must be taken directly to the court of appeals. Code, § 11. This includes judgments in suits transferred from the supreme court to the superior court. Code, § 50.

Section 2. Appeals to the superior court. Formerly the superior court had jurisdiction of appeals from the marine and the district courts of New York city (Code of 1848, § 302), but it has no longer any appellate power in such cases, as all appeals from those courts are now heard in the court of common pleas. Code, §§ 351, 352; *Wood v. Kelly*, 2 Hilt. 334; *Hawkins v. Mayor, etc., of New York*, 5 Abb. 344.

Section 3. Proceedings reviewed in supreme court. In case proceedings are had on a writ of *habeas corpus* granted by a justice of this court, sitting as a supreme court commissioner, such proceedings may be removed by *certiorari* into the supreme court, to be there examined and corrected. 2 R. S. 573 (593), § 69; *Lemmon v. The People*, 26 Barb. 270; S. C. affirmed, 20 N. Y. (6 Smith) 562.

CHAPTER X.

COMMON PLEAS OF NEW YORK CITY.

ARTICLE I.

ORGANIZATION.

Section 1. History of the court. The first record we have of a court of common pleas in the city of New York, is found in the charter granted to that city by Dongan, governor of the Province of New York, in 1686, but as that court was merely the continuation of the tribunal then in existence, a brief sketch of its history will not be out of place here, and for further information the student is referred to the "History of the Court of Common Pleas, with an account of the judicial organization of the State," by Hon. Chas. P. Daly. 1 E. D. Smith, Introduction.

In the year 1653, there was established by the Dutch, at New Amsterdam, the courts of the Schout, Burgomasters and Schepens, which had the two-fold function of council or board for the management and regulation of municipal affairs, and of a court of justice with almost unlimited jurisdiction, both civil and criminal. When the colony passed into the hands of the English in 1664, the name of the city was changed to New York, but the municipal and judicial organization was not interfered with until 1665, when Nicolls, who had assumed the government as the representative of James, Duke of York, issued a proclamation on the 12th of June of that year, abolishing the form of government established by the Dutch, and declaring that the government of the city should be intrusted to persons "known thereafter as the mayor, aldermen and sheriff, according to customs of the corporations in England." These officers were declared to be a body politic and corporate, with power to administer the affairs of the city according to law. They convened shortly afterward, re-appointed the former clerk of the court of Schout, Burgomasters and Schepens, and changed its name to the "mayor's court." These officers, the mayor taking the place of Burgomaster, the aldermen that of Schepens, and the sheriff corresponding to the Schout, were appointed by the acting governor.

For the period of a little more than a year, viz., from August, 1673, to October, 1674, during which time the Dutch again had possession of the city, the court was re-organized under its old name, but with that exception the mayor's court remained substantially under its original organization, regulating municipal affairs and exercising judicial functions, both in civil and criminal matters, until the year 1684, when a recorder was appointed, who took his seat with the court. The next important change which occurred, was under the Dongan charter in 1686, when the mayor, recorder and aldermen, or any three of them (of whom the mayor or recorder was required to be one), were authorized to hold, within the city, a *court of common pleas*, for the trial of all civil actions. Thus the duties of these officers in civil actions was separated from their legislative powers, and also from their powers as criminal magistrates. The court, however, continued to be called by the familiar title of the mayor's court until 1821, when its name was changed, by act of legislature, to "The Court of Common Pleas for the City and County of New York." The same act made provision for a *first judge* to be appointed by the council of appointment, and who should hold office during good behavior, or until sixty years of age. Laws of 1821, ch. 72. But by the constitution adopted one year later, the power of appointment was vested in the governor, and the term of office was changed to five years.

By the act of 1821 it was the especial duty of the first judge to hold the court, and he was authorized to hold it without the mayor, recorder and aldermen, although they were still at liberty to sit in it. Laws of 1821, ch. 72.

The clerk of the city and county of New York was, by virtue of his office, clerk of this court. 2 R. S. 216 (225), § 24.

In 1834 an associate judge was added to the court, with all the powers of the first judge. Laws of 1834, ch. 94, § 1.

A few years later an additional associate judge was created, with the same powers as the other two (Laws of 1839, ch. 116, § 2), and thus constituted the court remained until the adoption of the constitution of 1846.

That instrument provided that the court should remain under its then existing organization until otherwise directed by the legislature (Const. of 1846, art. 14, § 12), and that its judicial officers should be elected at such times and in such manner as the legislature should direct. Const. of 1846, art. 6, § 18.

Present organization.

By an act passed the following year it was provided that an election of three judges for this court should be had in June of that year, whose terms of office (to be determined by lot) should expire respectively at the end of two, four and six years, and that the election of judges thereafter should be for the term of six years. Laws of 1847, ch. 255.

Section 2. Present organization.

a. Number of judges. By the 6th article of the constitution, as adopted in 1869, the court of common pleas of the city of New York is continued, and is hereafter to be composed of the three judges in office at the time of the adoption of that article, and their successors, and three additional judges. A chief judge is to be appointed by the justices of the court, from their own number, who is to act as such during his official term. Const., art. 6, § 12.

b. Election of judges. The judges of this court are to be chosen by the electors of the city of New York. Const., art. 6, § 13.

Provision was made for the election of the three additional judges, under the direction of the legislature. Const., art. 6, § 24; Laws of 1870, ch. 86, § 2.

c. Term of office. They hold their office for fourteen years from and including the first day of January next after their election, but no person is qualified to act as such judge longer than until and including the last day of December next, after he shall be seventy years of age. Const., art. 6, § 13.

d. Compensation. The compensation of the judges of this court is to be established by law, and it cannot be diminished during their term of office. Const., art. 6, § 14. They are not allowed to receive fees for any service. Code, § 35.

e. Certificate of age, etc. Each judge is required, within ten days after entering upon his duties, to make and sign a certificate, which shall be filed in the office of the secretary of state, setting forth his age and the time when his official term will expire. Laws of 1870, ch. 86, § 8.

f. Vacancies, how filled. Successors to those whose terms of office expire by the effluxion of time or the disability of age shall be chosen at the general election preceding the expiration of such term. Laws of 1870, ch. 86, § 9. Vacancies occurring from any other cause are filled at the next general election, happening not less than three months after the vacancy occurs; and

Original jurisdiction.

until it is so filled, the governor, with the concurrence of the senate, or, if the senate is not in session, the governor may appoint a successor to fill such vacancy, and such appointment continues to and including the last day of December next after the election at which the vacancy shall be filled. Laws of 1870, ch. 86, § 9; Const., art. 6, § 9. See *ante*, 294.

ARTICLE II.

JURISDICTION OF THE COURT.

Section 1. Original jurisdiction.

a. Cause of action arising in the city. The court of common pleas for the city and county of New York has jurisdiction of the following actions when the cause or some part thereof has arisen in such city.

1. For the recovery of a penalty or forfeiture imposed by statute.

2. Against a public officer or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command or in his aid, shall do any thing touching the duties of such office. Code, §§ 33, 124.

b. Subject of action situated in the city. It also has jurisdiction of the following actions when the subject, or some part thereof, is situated within such city.

1. Actions for the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest, and for injuries to real property.

2. For the partition of real property.

3. For the foreclosure of a mortgage of real property.

4. For the recovery of personal property distrained for any cause. Code, §§ 33, 123.

c. Defendants residing in the city. The court of common pleas has jurisdiction of all other actions.

1. Where all the defendants reside or are personally served with the summons within the city of New York; or,

2. Where one or more of several defendants jointly liable on contract, reside or are personally served with the summons within that city. Code, § 33.

d. Actions against corporations. Its jurisdiction extends to actions against corporations:

Under the constitution — Same jurisdiction as county court.

I. Created under the laws of this State, and transacting their general business or keeping an office for the transaction of business within the city of New York or established by law therein ; or

II. Created by or under the laws of any other State, government or country.

1. For the recovery of any debt or damages, whether liquidated or not, arising upon contract, made, executed or delivered within the State ; or

2. Upon any cause of action arising within this State. Code, § 33.

An action against a corporation created by or under the laws of any other State, government or country, may be brought in this court.

1. By a resident of this State for any cause of action.

2. By a plaintiff not a resident of this State, when the cause of action shall have arisen, or the subject of the action shall be situated, within the State. Code, § 427.

e. Under the constitution. The sixth article of the constitution, as adopted in 1869, declares, that this court shall be continued with such powers and jurisdiction as it now possesses, “and such further civil and criminal jurisdiction as may be conferred by law.” Const., art. 6, § 12.

f. Same jurisdiction as county court. This court possesses the same powers and jurisdiction as county courts, which includes special proceedings for the disposition of the real estate of infants, where such real estate is situated in the city of New York ; the care and custody of the persons and estates of lunatics, persons of unsound mind, or habitual drunkards, residing in the city ; the mortgage or sale of the real estate of religious corporations, and in the admeasurement of dower in lands within the city. Laws of 1847, ch. 470, § 21 ; Laws of 1847, ch. 280, § 31. Cited in 4 Stat. at Large, 584, § 21 ; id. 564, § 31.

By an act passed in 1854, it was declared that this court should have all the powers then or thereafter to be invested in the county courts, so that, whenever any county court would have jurisdiction of any action or proceeding, the court of common pleas has jurisdiction of it if within its territorial jurisdiction. Laws of 1854, ch. 198. As to powers and jurisdiction of county courts, see title County Courts.

g. In equity. There is now no question as to the equity juris-

diction of this court, for beside the equity powers expressly conferred upon it in common with the county courts (4 Stat. at Large, 584, § 21; id. 564, § 31; Laws of 1854, ch. 198), the courts have declared that, under subdivision 2 of section 33 of the Code, the court of common pleas may exercise the same jurisdiction as the late court of chancery, provided the defendant resides or is personally served with the summons within the city of New York. *Christy v. Libby*, 5 Abb. N. S. 192; S. C., 2 Daly, 418; affirming S. C., 35 How. 119; *Carey v. Carey*, 2 Daly, 424.

h. Service of process, etc. When actions are commenced against non-residents of the city under the second subdivision of section 33 of the Code, jurisdiction of the person is obtained by a personal service of process within the city (*Zeregal v. Benoist*, 33 How. 129; S. C., 7 Rob. 199); and when so obtained, the jurisdiction of this court is co-equal with that of the supreme court. *McIvor v. McCabe*, 16 Abb. 319; S. C., 26 How. 257; *Porter v. Lord*, 13 id. 254; S. C., 4 Abb. 43; 4 Duer, 682; *Bates v. Reynolds*, 7 Bosw. 685. A service of process will not be sustained, however, when the defendant is induced to come within the jurisdiction of the court by misrepresentations. *Goupil v. Simonson*, 3 Abb. 474; *Carpenter v. Spooner*, 2 Sandf. 717; S. C., 2 Code R. 140; S. C. affirmed, 3 id. 23; and see *Benninghoff v. Oswell*, 37 How. 235. See *ante*, 327, 328. If the defendant is served with process out of the jurisdiction of the court, his voluntary appearance in the action will cure the defect. *Smith v. Dipeer*, 2 Code R. 70.

i. Attachment against non-resident. In an action under the 2d subdivision of section 33 of the Code, where the defendant is a non-resident of the city, the issuing of an attachment and levy upon his property thereunder, before the service of summons in the action upon him, does not give the court any jurisdiction, either of the subject-matter of the action or of the person of the defendant, and the levy made in that manner is wholly void. *Zeregal v. Benoist*, 33 How. 129; S. C., 7 Rob. 199. See *Kerr v. Mount*, 28 N. Y. (1. Tiff.) 659. But in such a case the attachment may be issued and accompany the summons into the sheriff's hands, and may be served after the summons has been duly served, for until due service of the summons, the court has no jurisdiction of the action, and a levy would be unauthorized. The attachment becomes valid upon

Injuries to personal property — Jurisdiction generally.

the service of the summons. *Gould v. Bryan*, 3 Bosw. 626; *Woodward v. Stearns*, 10 Abb. N. S. 395.

j. Injuries to personal property. An action may be maintained in this court for injuries to personal property, if jurisdiction of the person of the defendant can be obtained, although the acts complained of were committed in another State. *Smith v. Butler*, 1 Daly, 508.

k. Mechanics' liens. This court has exclusive jurisdiction of proceedings upon liens against real estate, in the city and county of New York, except that, when the lien is filed for a sum not exceeding \$100, proceedings may be had thereon in the marine or the justice's court. Laws of 1851, ch. 513, § 4.

l. Forfeited recognizances. Judgments upon recognizances, docketed with the New York county clerk, are under the jurisdiction and control of the New York common pleas, which may remit such forfeitures and discharge the dockets of judgments entered thereon. Laws of 1854, ch. 198, § 6; Laws of 1845, ch. 229. See Laws of 1861, ch. 333; *The People v. Petry*, 2 Hilt. 523.

m. Supplementary proceedings. This court has jurisdiction of and may entertain proceedings supplementary to execution, on a judgment of the marine or the district court of New York city, where a transcript of the judgment is docketed with the county clerk, and the amount recovered exceeds, exclusive of costs, \$25, or on a judgment of any other court when execution has been issued to the city and county of New York. Code, § 292.

n. Jurisdiction presumed. The jurisdiction of this court will be presumed until the contrary appears. *Hart v. Seixas*, 21 Wend. 40, 48; *Foot v. Stevens*, 17 id. 483. See *Chemung Canal Bank v. Judson*, 8 N. Y. (4 Seld.) 254, 260.

o. Jurisdiction generally. There having been some doubts expressed as to the general powers and jurisdiction of this court, the legislature, by an act passed in 1854, affirmed its powers in remitting fines and forfeitures, in correcting and discharging the dockets of judgments entered upon recognizances, conferred upon it all the powers then or thereafter to be given to the county courts, and confirmed generally its powers as a court of original and general jurisdiction as they were exercised before the constitution of 1846. See Laws of 1854, ch. 198.

Section 2. The court has no jurisdiction.

a. Actions against the mayor, etc. The court of common pleas has no jurisdiction of an action against the mayor, alder-

Proceedings against vessels — Appellate jurisdiction.

men and commonalty of New York. Laws of 1867, ch. 586, § 6. That is a public statute and need not be specially pleaded. *Bretz v. The Mayor, etc., of New York*, 35 How. 130; S. C., 6 Rob. 325; 4 Abb. N. S. 258; reversing S. C., 3 id. 478.

b. Proceedings against vessels. Proceedings *in rem* against vessels, under the act of 1862 (Laws of 1862, ch. 482), cannot be had in this court; the act conferring jurisdiction upon State courts in such cases is unconstitutional. *Bird v. Steamboat Josephine*, 39 N. Y. (12 Tiff.) 19; S. C., 6 Trans. App. 5; reversing S. C., 50 Barb. 501. See *Brookman v. Hamill*, 43 N. Y. (4 Hand) 554.

c. Land out of the State. Under subdivision 1 of section 33 of the Code, the court cannot entertain an action to set aside as fraudulent a conveyance of land situated in another State. *Bennett v. Erving*, 4 Rob. 671; S. C., 32 How. 384. And the rule is the same if the action is for damages for injuries to real property situated out of the State. *Mott v. Coddington*, 1 Rob. 267; S. C., 1 Abb. N. S. 290. See art. 2, § 1, of this chapter, *ante*, 339.

Section 3. Appellate jurisdiction.

a. Exclusive jurisdiction. The only mode of reviewing judgments of the marine court of the city of New York, or of the justices' courts of that city, is by an appeal to this court. Code, §§ 34, 351, 352.

b. Final judgment. The judgment of this court upon such an appeal is final, unless the general term grants an order allowing an appeal to the court of appeals. Code, § 11, subd. 3.

All the powers which the superior court formerly had on appeals from these inferior courts are now vested in the common pleas. *Wood v. Kelly*, 2 Hilt. 334.

ARTICLE III.**POWERS.****Section 1. Of the court.**

a. Discovery of books, etc. In all cases pending before this court, it may compel a discovery of books, papers, and documents in the same manner as the supreme court. 4 Stat. at Large, 550; Laws of 1841, ch. 38. See *Gould v. McCarty*, 11 N. Y. (1 Kern.) 575.

Unwilling witness — Of the judges — As supreme court commissioners.

b. Unwilling witness. The court may issue a summons to any person within the county, whose deposition is necessary on a motion or other proceeding, to attend before a judge of the court and make such deposition, and obedience to such process may be enforced as in case of a subpoena. Laws of 1840, ch. 276, §§ 3, 4; Code, § 401, subd. 7. This provision of the Code does not apply to a party to the action. *Hodgskin v. Atlantic and Pacific R. R. Co.*, 3 Daly, 70; 5 Abb. N. S. 73.

c. Commitment. This court has exercised the power of committing a party for the non-payment of a tax. *Kahn's Case*, 11 Abb. 147; S. C., 19 How. 475.

d. Inferior court judgments. This court has control over judgments of the marine and the justices' courts of New York city, when docketed with the county clerk, and may order a set-off between such judgments. *Hayden v. McDermott*, 9 Abb. 14.

e. Subpœnas. The court has, from an early period, exercised the power of issuing writs of subpoena to persons in any part of the State. See Greenleaf's Laws of 1789, p. 262.

f. Terms, officers, etc. It may appoint its general and special terms, prescribe their duration, and alter such appointment. Code, § 35. It may appoint a crier (Code, § 39) and a clerk. Laws of 1854, ch. 198.

Section 2. Of the judges.

a. Chamber business. The judges of this court at chambers have the same powers as the justices of the superior court, which are substantially the same as those of a judge at special term. Laws of 1830, ch. 186, §§ 7, 8, 9; *Devlin v. Platt*, 11 Abb. 398; S. C., 20 How. 167. See 4 Stat. at Large, 584, § 22; Laws of 1828, ch. 137, § 23; Laws of 1821, ch. 72; *Renard v. Hargous*, 13 N. Y. (3 Kern.) 259; Laws of 1847, ch. 255. Any proceeding commenced before one judge of this court may be continued before any other judge of the court. Laws of 1840, ch. 276, §§ 2, 4.

b. Delivery of books, etc. Any judge of the court may entertain proceedings to compel a delivery of the books, etc., of a public office. *Devlin v. Platt*, 11 Abb. 398; S. C., 20 How. 167.

c. As supreme court commissioners. The power of the judges of this court to act as supreme court commissioners is preserved to them, as it was possessed and exercised prior to the constitution of 1846. Laws of 1847, ch. 255; *Renard v. Hargous*, 13 N. Y. (3 Kern.) 259; *Devlin v. Platt*, 11 Abb. 398; S. C., 20 How. 167.

On appeal — Other judgments — Clerk — Crier — Attorneys.

d. Holding other courts. The judges of this court may, under the appointment of the governor, hold circuits and special terms of the supreme court. Const., art. 6, § 12; Laws of 1870, ch. 408, § 8. By an act passed in 1870, any judge of this court is authorized and empowered to hold terms of the court of general sessions in and for the city and county of New York, in case of the temporary disability or absence of the recorder or city judge. Laws of 1870, ch. 554.

ARTICLE IV.

JUDGMENT, HOW RENDERED.

Section 1. On appeal. All judgments on appeal are rendered at the general term of the court. Code, § 37. A concurrence of two judges is necessary to pronounce such judgment, and if two do not concur, the appeal must be reheard. Code, § 38. Where three judges hear an appeal, and two of them pronounce a judgment without consultation with the third, such judgment will be allowed to stand, though it is always preferable in such a case that there should be a consultation. *Parrott v. The Knickerbocker Ins. Co.*, 38 How. 508; S. C., 8 Abb. N. S. 234; 1 Sweeny, 533.

Section 2. Other judgments. All other judgments must be given at the special term. Code, § 37.

ARTICLE V.

OFFICERS.

Section 1. Clerk. Until the year 1854 the clerk of the city and county of New York was clerk of this court, but in that year the legislature authorized the court to appoint a clerk, who performs the duties pertaining to that office. Laws of 1854, ch. 198. See 1 E. D. Smith, Preface.

Section 2. Crier. The court has power also to appoint a crier, who holds his office during the pleasure of the court, and receives a salary fixed by the supervisors of the city of New York, and is paid out of the county treasury. Code, § 39.

Section 3. Attorneys. Attorneys, when admitted to practice by the supreme court, are entitled to all the privileges of this court. Laws of 1847, ch. 280, § 75; 4 Stat. at Large, 577.

ARTICLE VI.

TERMS.

Section 1. General term.

a. Appointment. The court has power to appoint general and special terms thereof, to prescribe their duration, and to alter such appointment from time to time. Code, § 35.

b. Rooms, etc. The supervisors of the county of New York should provide the court with rooms, attendants, fuel, lights, and stationery suitable and sufficient for the transaction of its business. In case the sheriff neglects to do so, the court may order the sheriff to provide the same, and his expenses become a county charge. Code, § 28.

c. Number of judges. A general term may be held by any two of the judges of the court. Code, § 36.

d. Jurisdiction. The general term alone has power of rendering judgment in cases on appeal. Code, § 37.

The construction which has been given to section 37 of the Code is, that the general term should exercise only an appellate jurisdiction, except in the cases provided for by section 265 of the Code. *Matter of Walker*, 2 Duer, 655.

Section 2. Special term.

a. By whom held. The special term must be held by a single judge. Code, § 36.

b. Appointment, rooms, etc. The provisions already noticed respecting the appointment of terms, and the providing of rooms and accommodation for the general term, are equally applicable to the special term. Code, §§ 28; 35.

c. Jurisdiction. All judgments, except upon appeal, must be given at the special term. Code, § 37.

ARTICLE VII.

REMOVAL OF CAUSES TO SUPREME COURT.

Section 1. What actions may be removed. Any action brought under subdivision 2 of section 33 of the Code, and pending in the court of common pleas, may be removed into the supreme court, and the place of trial may be changed by the supreme

Proceedings on removal — Supreme court rules.

court, as if the action had been commenced in that court. Code, § 33, subd. 2.

Section 2. Proceedings on removal.

a. How removed. The removal and change of place of trial are effected by an order made in the supreme court on motion; and the cause is deemed to be removed into the supreme court when a certified copy of such order is filed in the office of the clerk of the court of common pleas. Code, § 33, subd. 2. On a motion to remove a cause into the supreme court, the papers should be entitled in the "Court of Common Pleas." *Miller v. Dows*, 2 How. 98.

b. Proceedings after removal. The supreme court proceeds in such action in the same manner as though it had been originally commenced in that court; and the clerk with whom the order of removal is filed is bound to deliver forthwith to the clerk of the county, in which, by such order, the trial is directed to be had, to be filed in his office, all process, pleadings and proceedings relating to such cause. Code, § 33, subd. 2.

c. Removal discretionary. The power of the supreme court to remove into itself a cause pending in the common pleas is a discretionary power, and not one giving a party applying therefor a strict right. *Campbell v. Butler*, 4 Abb. 55.

d. Removal of special proceedings. No writ of *habeas corpus* or *certiorari* shall be allowed, whereby any special proceeding may be removed, before a final decision in such proceeding, from the court of common pleas into the supreme court. Laws of 1844, ch. 32; *Deolin v. Platt*, 20 How. 167; S. C., 11 Abb. 398.

ARTICLE VIII.

RULES.

Section 1. Supreme court rules. The rules of the supreme court control the practice of this court, so far as they are applicable thereto. A convention of the general term justices of the supreme court, the chief judges of the superior courts of cities, the chief judge of the New York common pleas and of the city court of Brooklyn, are authorized to meet every two years at the capitol in Albany, to revise, alter, abolish and make rules which are binding upon all courts of records, so far as applicable to the practice thereof. Laws of 1870, ch. 408, § 13.

Further rules — Appeals from — Appeals to.

Section 2. Further rules. The various courts and general terms are authorized to make such further rules for the transaction of business before them respectively, not inconsistent with those adopted in convention, as they in their discretion may deem necessary. Sup. Ct. Rules, 96.

ARTICLE IX.

APPEALS.

Section 1. Appeals from. Appeals from the general term of this court are taken directly to the court of appeals. Code, § 11. Certain special proceedings, however, may be removed by certiorari and reviewed by the supreme court. 2 R. S. 573 (593), § 69. But no proceedings can be removed until there has been a final determination in the matter. *Id.* Laws of 1844, ch. 32; *Devlin v. Platt*, 20 How. 167; S. C., 11 Abb. 398.

Section 2. Appeals to. Appeals from the general term of the marine court of the city of New York, or from a justice's court of that city, lie exclusively to the general term of this court. Code, §§ 34, 351, 352. All the jurisdiction and powers of the superior court as formerly exercised by it in case of appeals from the marine and district courts are now vested in this court. *Wood v. Kelly*, 2 Hilt. 334.

As to all cases appealable from the marine court the court of common pleas is the court of last resort, unless it should allow an appeal from its decision to the court of appeals. *Leland v. Smith*, 3 Daly, 309. Its orders in cases of contempts are conclusive. *Ib.*

CHAPTER XI.

SUPERIOR COURT OF BUFFALO.

ARTICLE I.

ORGANIZATION.

Section 1. Establishment. The recorder's court of the city of Buffalo was organized in 1839, and the present superior court of Buffalo is a continuation of that court with an enlarged jurisdiction. It was established by an act of legislature, passed March 28, 1854. Laws of 1854, ch. 96. It was originally composed of three justices, elected by the electors of the city of Buffalo, who held office for eight years. *Ib.* This act has been declared constitutional. *International Bank v. Bradley*, 19 N. Y. (5 Smith) 245.

Section 2. Present organization. Under the present constitution the superior court of Buffalo is continued, with the powers and jurisdiction it now has and such further civil and criminal jurisdiction as may be conferred by law. It is composed of the three judges in office at the adoption of the 6th article of the constitution and their successors. Const., art. 6, § 12.

Section 3. Election and term of office. Judges of this court are chosen by the electors of the city of Buffalo for the term of fourteen years, from and including the first day of January next after their election. But no person can hold the office of judge longer than until and including the last day of December next after he shall be seventy years of age. Const., art. 6, § 13.

Section 4. Compensation. Each justice receives a salary of \$5,000 per annum (Laws of 1870, ch. 813), which cannot be diminished during his term of office. Const., art. 6, § 14. He is not allowed to receive fees for any official service. Laws of 1854, ch. 96, § 5.

Section 5. Certificate of term; vacancies. Each justice is required, within ten days after entering upon the duties of his office, to make and sign a certificate stating his age and the time when his official term will expire, which must be filed in the office of the secretary of state. Laws of 1870, ch. 86, § 8.

Not to practice — Seal, etc. — Chief judge — Original jurisdiction.

Vacancies occurring by the effluxion of time or the disability of age, are filled at the preceding general election. *Id.*, § 9. Vacancies otherwise occurring are filled, for a full term, at the next general election happening not less than three months after the vacancy occurs, and until so filled, the governor, with the advice and consent of the senate, or, if the senate is not in session, the governor may appoint to fill the vacancy. Any such appointment continues to and including the last day of December next after the election at which the vacancy shall be filled. Const., art. 6, §§ 9, 12; Laws of 1870, ch. 86, § 9.

Section 6. Not to practice. The justices are not allowed to practice in any of the courts of this State or of the United States. Laws of 1854, ch. 96, § 5.

Section 7. Seal, etc. The court possesses a seal, and is declared to be a court of record. Laws of 1854, ch. 96, §§ 1, 7.

Section 8. Chief judge. It is the duty of the judges of this court to appoint from their own number a chief judge, who shall act as such during his official term. Const., art. 6, § 12.

ARTICLE II.

JURISDICTION.

Section 1. Original.

a. Subject of action situate in the city. This court has jurisdiction of the following actions and proceedings, when the subject thereof is situate within the city of Buffalo:

I. For the recovery of real property, or of any estate or interest therein, or for the determination, in any form, of any such right or interest or claim thereto, and for injuries to real property and chattels real.

II. For the partition of real property.

III. For the foreclosure of mortgages of real property and chattels real.

IV. For the admeasurement of dower.

V. For the sale, mortgage or other disposition of real property, of an infant, habitual drunkard, lunatic, idiot, and persons of unsound mind.

VI. To compel a specific performance by an infant heir, or other person, of a contract respecting real property and chattels real

VII. For the mortgage or sale by a religious corporation of its real property, and the application of the proceeds thereof. Laws of 1854, ch. 96, § 9; Laws of 1870, ch. 313.

b. Jurisdiction in general. It has jurisdiction of all other civil actions and proceedings, and of the subject-matter thereof, whether the cause thereof has arisen, or the subject thereof is situate, in the city of Buffalo or not; and it may acquire jurisdiction of the person and property by —

I. Appearance.

II. Personal service in the city, of the summons or process, upon the defendant.

III. Personal service in the city of the summons or process upon one or more of several defendants, and upon the others, in the same place and manner, including by publication, as if the action were in the supreme court.

IV. Service of the summons or process in the same place and manner, including by publication, if it could by law be served, if the action or proceeding were in the supreme court, in the following cases:

1. When the defendant, or one or more of several defendants, resides or has an office for the transaction of business in said city.

2. When the cause of action arose in said city.

3. When the contract was made or was, by its terms, to be performed in said city.

4. When the defendants are non-residents of the State, and one or more of them has property in the city.

5. When the defendant is a corporation created under the laws of this State and keeps an office or agency, or is established in said city.

6. When the defendant is a foreign corporation and keeps an office or agency or has property in said city.

7. When the action is for divorce on the ground of nullity of the marriage contract, or for a divorce dissolving the marriage contract, or for a separation, and either of the parties resides in said city, or the marriage was solemnized in said city, or the acts complained of were committed in said city.

The term "process," as used in this section, includes the papers by which any proceedings are commenced. Laws of 1870, ch. 313.

c. Special proceedings, etc. This court has, within the city of

Appellate — Powers of the court.

Buffalo, concurrent jurisdiction with the supreme court, of all common law and statutory writs (such as *mandamus*, *habeas corpus*, *ne exeat*, etc.), of the remedies heretofore obtained by any writ now abolished, which may now be obtained by civil action, and of all special proceedings whatsoever. Laws of 1857, ch. 361.

d. Plea of title in justice's court. It has exclusive jurisdiction of all actions discontinued in a justice's court in the city of Buffalo on account of the plea of title being interposed. Laws of 1857, ch. 361.

e. Custody of idiots, etc. This court has the care and custody of all idiots, lunatics, persons of unsound mind and habitual drunkards, residing in the city of Buffalo, and of their real and personal estate. Laws of 1854, ch. 96, § 11.

f. Service of summons. In those cases where the jurisdiction of the court is not made to depend on the service of the summons within the city of Buffalo, the summons may be served in any part of the State. Laws of 1854, ch. 96, § 13.

g. Jurisdiction presumed. The jurisdiction of this court will in all cases be presumed. Laws of 1854, ch. 96, § 1; *International Bank v. Bradley*, 19 N. Y. (5 Smith) 245, 253.

Section 2. Appellate.

a. From justices' courts. In the city of Buffalo, appeals from the courts of justices of that city shall be to the superior court, and if on such appeal a new trial is had, such trial must be had in the superior court. Code, § 352.

b. From special term. Appeals may be taken to the general term of this court in all cases, where an appeal could be taken to the general term of the supreme court, if the action or proceeding were pending therein. Laws of 1857, ch. 361.

ARTICLE III.**POWERS.****Section 1. Of the court.**

a. Writs and process. Subpoenas, attachments for contempt, precepts for the collection of interlocutory costs, and all writs and process awarded by the court or any judge thereof, may be issued to, and executed in, any county of the State. Laws of 1857, ch. 361.

Of the judges — Clerk — Crier — Attorneys — Sheriff and constables — Terms.

b. Same power as supreme court. This court has the same power as the supreme court to enforce all its process, orders and judgments, and to grant new trials and rehearings. Laws of 1857, ch. 861.

Section 2. Of the judges. Each of the justices of this court has all the powers possessed by the recorder of the city of Buffalo, December 1, 1846, and all the powers possessed by a justice of the supreme court out of court or at chambers. Laws of 1857, ch. 861. Any proceeding commenced before one of the justices may be continued before another. *Ib.*

ARTICLE IV.

OFFICERS.

Section 1. Clerk. The clerk of this court is appointed by the court and holds his office during the pleasure of the court. He receives a salary, and in addition the same fees as are paid to the clerks of the supreme court. Laws of 1854, ch. 96, § 6.

Section 2. Crier. The court also appoints a crier, who holds his office during the pleasure of the court. Laws of 1854, ch. 96.

Section 3. Attorneys. Attorneys, when admitted to practice by the supreme court, are entitled to the privileges of this court.

Section 4. Sheriff and constables. It is the duty of the sheriff of Erie county, and as many constables as the court shall direct, and summon by the sheriff, to attend the terms of the court. Laws of 1854, ch. 96, § 8.

ARTICLE V.

TERMS AND JUDGMENTS.

Section 1. Terms.

a. General terms. Four general terms are held in each year, at such times as the justices of the court may, by order, prescribe, and the justices holding the terms may adjourn such terms, from time to time, as the business of the court may require. Laws of 1854, ch. 96, § 22. A general term may be held by two justices. Laws of 1870, ch. 313. Demurrers must be heard at general term. *Ib.*

b. Trial term. Six trial terms are held in each year, at such

Judgments — Removal to the supreme court.

times as the justices of the court may, by order, prescribe; and the justice holding the same may adjourn such term, from time to time, as the business before it may require. Laws of 1854, ch. 96, § 22; Laws of 1870, ch. 313. Trial terms are held by a single justice. *Ib.* Issues of fact are triable at the trial terms, except as otherwise provided. *Ib.*

c. Special term. The justices of the court appoint special terms to be held by a single justice, at such times and places as are named in the appointment, for the transaction of all business, except the trial of issues of fact by a jury, and may authorize issues of fact triable by the court, to be noticed and brought on for trial at such terms. Laws of 1870, ch. 313.

d. Chamber business. It is the duty of the court to provide for the attendance of one of its justices for the transaction of chamber business, at such places and time as shall be designated by rule. Laws of 1870, ch. 313.

e. Petit jurors. The assessors of the city of Buffalo, who may associate the clerk of the court with them, make out and file with the clerk of the court, a list of 600 residents of the city, who are qualified to sit as petit jurors. Laws of 1854, ch. 96, § 28; Laws of 1857, ch. 361; Laws of 1870, ch. 313. From this list thirty-six persons, or such other number as the court may order, are drawn by the clerk in the presence of one of the justices. The court may order talesmen to be drawn from the list. Laws of 1857, ch. 361.

f. Rooms, etc. It is the duty of the supervisors of Erie county to provide rooms and accommodations for the court, and if they neglect or refuse to do so, the court may direct other persons to provide the same, whose expenses are a county charge. Laws of 1854, ch. 96, § 30.

Section 2. Judgments. Any judgment of this court may be docketed in any county of the State, with the same effect as judgments of the supreme court. Laws of 1854, ch. 96, § 21; Laws of 1857, ch. 361.

ARTICLE VI.

REMOVAL OF CAUSES.

Section 1. Removal to the supreme court.

a. When actions will be removed. The supreme court may remove any action pending in the superior court into the su-

Removal from the supreme court — Proceedings after removal.

preme court to be tried in some county other than Erie, when, if the action were pending in the supreme court, it would change the place of trial from Erie to some other county in the following cases :

1. When the cause of action has not arisen in the county of Erie, where the action is for the recovery of a penalty or forfeiture imposed by statute, or against a public officer, or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command, or in his aid, has done something touching the duties of such officer.

2. When there is ground to believe that an impartial trial cannot be had in the city of Buffalo, or the convenience of witnesses requires the change. Laws of 1870, ch. 313.

b. How removed. The removal is effected by order, made in the supreme court upon motion. Laws of 1870, ch. 313. Any justice of the supreme court, or of this court, may make an order staying proceedings in any action pending in the superior court for the purposes of such motion. Laws of 1854, ch. 96, § 16. The order staying proceedings may be revoked by the justice who granted it. *Ib.*

c. Proceedings after removal. On filing a certified copy of the order of removal, in the office of the clerk of the superior court, the action shall be deemed to be removed into the supreme court, which shall proceed therein as if the same had been commenced there; and the clerk of the superior court must forthwith transmit to the clerk of the county in which, by such order, the trial is directed to be had, all process, pleadings, and proceedings in such action, which are in his office. Laws of 1854, ch. 96, § 17.

Section 2. Removal from the supreme court.

a. Actions, how removed. Any action pending in the supreme court may be removed into the superior court by filing a written stipulation to that effect, signed by the attorneys for the respective parties, with the county clerk, who must enter an order for the removal of such action, and immediately transmit to the clerk of the superior court a certified copy of such order, and all the process, pleadings and proceedings in the action. Laws of 1854, ch. 96, § 18.

b. Proceedings after removal. After the certified copy of the order for removal, and the papers in the action, have been

transmitted to the superior court, that court has jurisdiction of the action, and may exercise the same powers in respect to it, and any proceedings therein, that the supreme court could have exercised if the action had remained in that court. Laws of 1854, ch. 96, § 18.

ARTICLE VII.

RULES.

Section 1. Supreme court rules. The general rules of the supreme court, adopted by the convention of judges (in which the chief judge of this court is entitled to sit), are binding upon this court, so far as they are applicable to its practice. Laws of 1870, ch. 408, § 13; Laws of 1854, ch. 96, § 27; Laws of 1870, ch. 313.

Section 2. Other rules. This court may make such other rules in regard to the transaction of business before it, not inconsistent with the general rules of the supreme court, as it may deem necessary. Sup. Ct. Rules, 96; Laws of 1854, ch. 96, § 27; Laws of 1870, ch. 313.

ARTICLE VIII.

APPEALS.

Section 1. Appeals from.

a. General term. Appeals from the general term of this court are taken directly to the court of appeals, in the same manner and in the same cases as from the supreme court. Laws of 1854, ch. 96, § 19; Laws of 1857, ch. 361; Code, § 11.

b. Special term. Appeals may be taken from the special to the general term of this court, in all cases where an appeal could be taken to the general term of the supreme court, if the action or proceeding were pending therein. Laws of 1854, ch. 96, § 19; Laws of 1857, ch. 361; *The Hollister Bank of Buffalo v. Vail*, 15 N. Y. (1 Smith) 593.

Section 2. Appeals to. Appeals from courts of justices in the city of Buffalo lie exclusively to this court. Code, § 352.

CHAPTER XII.

MAYOR'S AND RECORDER'S COURTS.

ARTICLE I.

ORGANIZATION.

Section 1. Origin.

a. In general. The mayor's and recorder's courts existing in the various cities of this State have each a common origin in the old Dutch court, established in New York in 1653, and denominated "the worshipful court of the schout, burgomaster and schepens." This ancient court retained its organization and its name until the government of the colony of New York, or, as it was then called, New Netherland, passed from Dutch to English hands, when this court was first called by its present name, the mayor's court. The court continued its old organization with but little change until 1684, when a recorder was for the first time appointed, and became an officer of the court. Two years later important changes were made in respect to the powers and duties of this court. The legislative power which it had previously exercised became vested in the common council. The jurisdiction of the mayor's court was confined to civil actions, and a new court was created, having jurisdiction of criminal causes only, called the court of quarter sessions, now the court of sessions. For a full and able historical sketch of the origin of these courts see the history of the court of common pleas, by Hon. Chas. P. Daly, 1 E. D. Smith, Preface.

Section 2. Establishment.

a. In general. The common origin of all the mayor's and recorder's courts of the cities of this State has been briefly noticed in the previous section. A brief review of the history of the establishment of some of the more important of these courts is here given, with a view to the furnishing of the sources from which further information may be derived, rather than to the presentation of the details of the organization and jurisdiction of each court. The space allotted to this part of this work forbids a more extended discussion.

Mayor's and recorder's courts of Albany, Buffalo, Hudson, Oswego, Rochester, etc.

b. Mayor's court of the city of Albany. The mayor's court of the city of Albany was established prior to 1828, and retained its name until 1867, when it was abolished, the statutes creating and regulating it repealed, and its jurisdiction transferred to the supreme court. See Laws of 1867, ch. 272.

c. Recorder's court of the city of Buffalo. The recorder's court of the city of Buffalo was organized in 1839, and was continued under its original name and organization until 1854. In that year its organization was changed, its jurisdiction extended, and the existence of the court itself merged in that of the superior court of Buffalo. Laws of 1854, ch. 96.

d. Mayor's court of the city of Hudson. The mayor's court of the city of Hudson was organized in the year 1813. See 2 R. L. 502. The original jurisdiction of this court, at the time of its organization, was limited and local, but by subsequent legislative enactments was extended to all causes of action, wherever arising. Its appellate jurisdiction was, however, confined to appeals from judgments of a justice of the peace of the city of Hudson. See Laws of 1829, ch. 101; Laws of 1844, ch. 189. The judgments of this court, when docketed, are enforceable in any county in this State.

e. Recorder's court of the city of Oswego. The recorder's court of Oswego was established and its jurisdiction prescribed and defined by the laws of 1848. See Laws of 1848, ch. 374. In the following year the provisions of the act establishing this court were made to conform to other acts establishing similar courts in other cities. See Laws of 1849, ch. 134. The judgments of this court, when docketed, are enforceable in the same manner and to the same extent as judgments of the supreme court. Laws of 1848, ch. 374.

f. Mayor's court of Rochester. The mayor's court of Rochester was established in 1844. See Laws of 1844, ch. 145. It was, however, abolished in the year 1849, and its jurisdiction transferred to the supreme court. See Laws of 1849, ch. 303.

g. Mayor's court of the city of Troy. The mayor's court of Troy was organized in 1816, and its jurisdiction prescribed and defined. See 2 R. S. 218 (227), § 9; Laws of 1816, ch. 144, § 26. The jurisdiction of this court was, however, modified in some important particulars in the year 1848. See Laws of 1848, ch. 86, § 5.

h. Recorder's court of the city of Utica. The recorder's court of Utica was established in 1844, and its jurisdiction was defined

by the act under which it was organized. See Laws of 1844, ch. 319.

i. Constitutional provisions. By the amended judiciary article of 1869, it is provided that the legislature may establish inferior local courts of civil and criminal jurisdiction, and, except as therein otherwise provided, may direct the time and manner of the appointment or election of all judicial officers. Const., art. 6, § 19. The foregoing provisions are applicable to the organization of mayor's and recorder's courts. They also in effect repeal subdivision 5 of section 14 of article 6 of the constitution of 1846, whereby it was provided that any inferior court of civil and criminal jurisdiction, established by the legislature in cities, shall, except in the cities of Buffalo and New York, "*have an uniform organization and jurisdiction in such cities.*"

Section 3. Election of mayor.

a. In general. It is provided by statute that the mayors of the several cities of this State shall be elected annually by ballot, by the male inhabitants entitled to vote for members of the common council of such cities respectively. Laws of 1840, ch. 21, § 1. It is further provided, that all provisions of law in force in the said cities in respect to the time and manner of notifying, holding and conducting elections for charter officers shall apply, so far as applicable, to the election of mayors in said cities respectively. Id., § 3.

b. In particular cities. The provisions of the statute before cited, in reference to the election of mayors of cities, are general, and in force where not affected by subsequent legislation. In most cities the time and manner of the election of mayor is prescribed by the special act, granting a charter to each city respectively, or by act amendatory thereto. The acts prescribing the time and manner of the election of the mayors of the following cities, and fixing their terms of office, are as follows: Albany, Laws of 1870, ch. 77; Cohoes, Laws of 1869, ch. 912; Hudson, Laws of 1864, ch. 289; Poughkeepsie, Laws of 1869, ch. 453; Buffalo, Laws of 1870, ch. 519; Brooklyn, Laws of 1864, ch. 384; New York, Laws of 1870, ch. 137; Long Island, Laws of 1870, ch. 719; Rochester, Laws of 1861, ch. 143; Newburgh, Laws of 1869, ch. 35; Laws of 1865, ch. 541; Schenectady, Laws of 1862, ch. 385; Troy, Laws of 1816, ch. 131; Binghamton, Laws of 1867, ch. 291; Laws of 1868, ch. 593; Auburn, Laws of 1869, ch. 273; Laws of 1870, ch. 339; Elmira, Laws of 1864, ch. 139;

Election of recorder — Courts, by whom held.

Watertown, Laws of 1870, ch. 452 ; Laws of 1869, ch. 714 ; Rome, Laws of 1870, ch. 25 ; Laws of 1871, ch. 49 ; Syracuse, Laws of 1847, ch. 475 ; Ogdensburgh, Laws of 1868, ch. 335 ; Utica, Laws of 1849, ch. 184 ; Laws of 1854, ch. 165.

Section 4. Election of recorder.

a. In general. As in the case of the election of mayors of cities, the statute provides generally for the election of recorders of cities, and also prescribes or limits the duration of their terms of office. It provides, that there shall be elected by the electors of each of the cities of this State (except the city and county of New York), in which the office of the recorder existed on the 1st day of December, 1846 (except Rochester), one recorder, who shall hold his office for four years from the first day of January next, and the respective recorders who shall be in office at the time this act shall take effect (except in the city and county of New York) shall continue such recorders until the first day of January next ; and all such recorders as shall hereafter be elected shall hold their office for four years from and after the first day of January succeeding their election. Laws of 1847, ch. 276, § 3 ; 3 R. S. 46, § 3. In every city of this State in which the office of recorder exists (except in the cities of New York, Rochester and Buffalo), there shall be elected at the general State election next preceding the expiration of the term of such recorder, a successor of such recorder. 3 R. S. 320 ; Laws of 1851, ch. 217.

These general statutory provisions are in many cases modified by special statutes, as will be found by a reference to the various charters of the different cities.

b. How elected. The manner of electing a recorder, under the general statute before cited, is also prescribed by that act, and all laws relating to general elections are made to apply thereto, so far as the same shall be applicable. See Laws of 1851, ch. 217, § 2.

Section 5. Courts, by whom held.

a. Originally. As originally established, the mayor's court was held by the mayor, five aldermen and the recorder. But in the year 1830 the laws governing the organization of these courts was so changed as to empower the mayor, recorder and aldermen, or any one of them, to hold court whether with or without a jury. See history of the court of common pleas, E. D. Smith, Preface, 41-80.

b. Present practice. The question as to who may hold the

Mayor's courts of Albany, Hudson and Troy—Jurisdiction in civil actions.

mayor's or recorder's court of any city under existing laws depends rather upon the special acts of the legislature organizing such courts, than upon any uniform system. This fact will be readily perceived by a reference to the following illustrations.

c. Mayor's courts of Albany, Hudson and Troy. The Revised Statutes provide that the mayor, recorder and aldermen of the city of Albany, or the mayor and recorder jointly, or either of them singly, with or without the presence of any of the aldermen, shall have power to hold a court of common pleas, to be called the mayor's court of the city of Albany. See 2 R. S. 217 (226), § 1. Similar provisions are also made respecting the mayor's courts of Hudson and Troy. See 2 R. S. 218 (227), §§ 4, 9.

Any alderman of the city of Albany, Hudson or Troy may in any case sit as a judge of the mayor's court of his city ; and in case of the sickness or absence of the mayor and recorder of either of the above cities, or of their offices being vacant, it shall be lawful for any three aldermen of such city to hold the mayor's court thereof. 2 R. S. 219 (228), § 17.

d. Utica. The recorder's court of the city of Utica is held by the recorder alone, except when trying criminal cases. Laws of 1844, ch. 319.

e. Oswego. The recorder's court of the city of Oswego is held by the recorder alone, or in his absence or inability to serve, by the mayor and any two aldermen. Laws of 1848, ch. 374.

ARTICLE II.

JURISDICTION.

Section 1. In civil actions.

a. In general. The jurisdiction of the mayor's and recorder's courts of cities in civil actions is defined and limited by the Code. See Code, § 33.

This jurisdiction extends to the following actions, when the cause of action has arisen, or the subject of the action is situated within the cities in which these courts are established :

1. Actions for the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest, and for injuries to real property.

2. Actions for the partition of real property.

When no jurisdiction — In general.

3. Actions for the foreclosure of a mortgage of real property.
4. Actions for the recovery of personal property distrained for any cause.
5. Actions for the recovery of a penalty or forfeiture imposed by statute.

6. Actions against a public officer, or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command, or in his aid, shall do any thing touching the duties of such officer. Code, §§ 33, 123, 124.

7. This jurisdiction extends also to all other actions where all the defendants reside within the cities in which such courts are situated. Code, § 33, sub. 2.

8. It also extends to actions against corporations created under the laws of this State, and transacting their general business, or keeping an office for the transaction of business, within those cities respectively, or established by law therein, or created by or under the laws of any other State, government, or country.

a. For the recovery of any debt or damages, whether liquidated or not, arising upon contract made, executed, or delivered within the State.

b. Or upon any cause of action arising therein. Code, § 33, sub. 3.

Before the adoption of the Code, the statute gave to the recorder's court of Utica jurisdiction, concurrent with the Oneida county court, of all special proceedings cognizable by a county court, when the cause of action arose or the subject-matter thereof was situated within the city of Utica. Such proceedings and the decisions therein were subject to appeal and removal to the supreme court, in the same manner as proceedings had or decisions made in the county court. Laws of 1845, ch. 291.

Section 2. When no jurisdiction.

a. In general. The jurisdiction of the mayor's and recorder's courts of cities is dependent on the Code. By section 33 of that act, the jurisdiction of these courts is expressly limited to certain cases, and such jurisdiction is not extended by any other section or provision of that act. *Zerega v. Benoist*, 7 Rob. 199; S. C., 33 How. 129. It follows that where no jurisdiction is, by the express terms of section 33 of the Code, conferred upon these courts, none can be exercised by them. *Ring v. McCoun*, 3 Sandf. 524; S. C. affirmed, 10 N. Y. (6 Seld.) 268.

Process — Powers of court.

b. When the cause of action does not arise within the city. There are certain actions over which mayor's and recorder's courts have no jurisdiction, unless the cause of action arose within the city where such courts are situated, or unless the subject of the action is situated therein. These actions are such as are included within the provisions of sections 123, 124 of the Code, and which are enumerated in the first six subdivisions of the preceding section of this article. Code, § 33, subd. 1. The provision of the Code conferring jurisdiction on these courts, where the cause of action arose within the city in which they are respectively located, relates only to such personal actions as are enumerated in sections 123, 124 of the Code, and does not confer jurisdictions relating to real property situated in another county, although the acts which furnish the grounds of the suit were all done within the city in which such courts may be held. *Ring v. McCoun*, 3 Sandf. 524; S. C. affirmed, 10 N. Y. (6 Seld.) 268. See *Newton v. Bronson*, 13 N. Y. (3 Kern.) 587; *Wood v. Hollister*, 3 Abb. 14; *Bush v. Treadwell*, 11 Abb. N. S. 27.

c. Where all the defendants do not reside within the city. In all actions other than those enumerated in sections 123, 124 of the Code, the mayor's and recorder's courts of cities have no jurisdiction unless all the defendants reside within the cities in which these courts are respectively held. This is expressly provided in section 33 of the Code, subdivision 2.

Section 3. Process.

a. In general. The old rules relating to process issuing out of a mayor's or recorder's court are abrogated by the Code, so far at least as such process is issued in a civil action. The general provisions of the Code in respect to process in actions brought in courts of record, apply, as a matter of course, to mayor's and recorder's courts. The old rules may, however, be found by referring to 2 R. S. 219 (228), §§ 19, 20; Laws of 1848, ch. 374, § 16; Laws of 1844, ch. 319, § 14.

ARTICLE III.**POWERS.****Section 1. Powers of court.**

a. In general. Every recorder's and mayor's court in this State possesses the same powers, in all cases pending before such

Rules and practice — Setting aside verdict, etc. — Fining jurors.

court, to compel the discovery and production of books, papers and documents, as are conferred, by the Revised Statutes, upon the supreme court. 4 Statutes at Large, 550, ch. 38, § 2; Laws of 1841, ch. 38, § 1.

b. Rules and practice. The rules and practice adopted and to be from time to time adopted by the supreme court in relation to proceedings for the discovery of books, etc., are to be adopted in these courts, except as to the length of any notice, or time in which any act is to be done; which may be modified by the rules of these courts. Laws of 1841, ch. 38, § 2.

Although the supreme court is to prescribe, by general rules, the cases in which a discovery may be compelled, an omission to frame such rules will not annul the inherent powers of these courts. In this respect, they possess and may exercise all the powers granted to the supreme court (*ante*, 30, § 1), and that authority is not suspended until rules are established by the supreme court, but may be exercised in all cases where the mode of procedure is prescribed by statute. *Gould v. McCarty*, 11 N. Y. (1 Kern.) 575, 581.

c. Setting aside verdict, etc. The mayor's court has exclusive authority to entertain a motion to set aside a verdict rendered in that court, or for a new trial. *Thurber v. Townsend*, 22 N. Y. (8 Smith) 517.

So this court has power to set aside a judgment on the merits entered on the report of a referee appointed by such court. *People v. Austin*, 43 Barb. 313. The mayor's court of Troy has the same power and authority as the county court of Rensselaer county, in hearing and determining appeals and writs of certiorari, arising upon causes tried within the city of Troy by any justice of the peace. Laws of 1891, ch. 133.

d. Fining jurors. The mayor's court of Hudson has the same power as the county courts to fine, excuse or discharge jurors. Laws of 1844, ch. 189, § 1.

The recorder's court of Utica has all the powers and authority of the courts of common pleas of the several counties in this State, in suits commenced or prosecuted therein. Laws of 1844, ch. 319, § 2. It has the same power to fine, excuse or discharge jurors, as are conferred by the Revised Statutes upon county courts. Laws of 1844, ch. 319, § 18; Laws of 1846, ch. 95; Laws of 1870, ch. 319, relate to this court but do not affect its powers or jurisdiction.

Powers of mayor — In general.

e. Remitting fines. The recorder's court of Oswego has exclusive power to remit fines and recognizances estreated by it. Laws of 1847, ch. 96. It has the same powers as a court of record, to fine, excuse or discharge any of the persons summoned as jurors. Laws of 1848, ch. 374, § 12.

Section 2. Powers of mayor.

a. In general. It is not within the intent or scope of this work to give in detail the powers of mayor as a judicial officer. A brief reference to the various statutes defining such powers is all that will here be given.

b. Vagrancy. As to the power of the mayor to commit a vagrant to the county poor-house or jail, see 1 R. S. 632 (585), §§ 2, 3.

c. Profanity. As to the power of the mayor to commit summarily any person using profane language in his presence while holding court, see 1 R. S. 674 (626), §§ 61, 62, 63.

d. Acknowledgment of deeds, etc. The mayor has power to take the proof or acknowledgment of deeds executed within the State. 1 R. S. 756, § 4. The acknowledgment or proof of a deed executed in any other State, if taken by the mayor of any city of the United States, has the same validity and effect as if taken before one of the justices of the supreme court of this State. Laws of 1845, ch. 109. See Laws of 1829, ch. 222; see, also, 1 R. S. 757 (709), § 6.

e. Forcible entries and detainers. As to the power of the mayors of cities respecting forcible entries or forcible detainers in their respective cities, see 2 R. S. 512 (526), § 18.

f. Summary proceedings to recover possession of lands. As to the power of the mayor of any city to remove a tenant under the statute authorizing summary proceedings to recover possession of land, see 2 R. S. 512 (529), § 28.

g. Preservation of the public peace. See 2 R. S. 704 (727), § 1.

h. Apprehensions. See 2 R. S. 706 (729), § 1.

i. Marriages. See 2 R. S. 139 (145), § 8.

j. Indigent children. As to the powers of the mayor of a city as guardian, *ex officio*, of indigent orphan children, see Laws of 1855, ch. 159, § 2.

k. Member of board of State canvassers. As to when the mayor of Albany becomes a member of the board of State canvassers, see 1 R. S. 137, § 30.

Powers of recorder.

Section 3. Powers of recorder.

a. Absconding and insolvent debtors. The recorders of cities may grant or refuse applications for attachments, under the 1st article of title 1, ch. 5, part 2 of the Revised Statutes; for the appointment of trustees under the 2d article; for the discharge of an insolvent from his debts, under the 3d article; to compel an assignment under the 4th article; and for the exemption of a debtor's person from imprisonment and arrest, under the 5th article, (2 R. S. 35, § 1); on the hearing of any petition under the said 3d, 4th or 5th articles, the recorder before whom the same may be pending may adjourn such proceeding from time to time, and may issue a subpoena requiring any person to appear and testify in the matter. 2 R. S. 37 (38), § 13.

b. Supreme court commissioner. Every recorder of a city, being of the degree of counselor in the supreme court, is, by virtue of his office, a supreme court commissioner. 2 R. S. 281 (292), § 32. The recorders of Albany, Hudson, Utica and Oswego have the powers of justices of the supreme court in chambers. 3 R. S. (5th ed.) 320, 347; Laws of 1848, ch. 374, § 20; Laws of 1849, ch. 150, § 10; Laws of 1848, ch. 320; Laws of 1849, ch. 121, § 4. The recorder of the city of Oswego has jurisdiction in proceedings supplementary to execution, whether the original action was brought in his own or any other court. Laws of 1857, ch. 96. There was a similar provision in relation to the recorder of Troy, but the office of recorder in that city has since been abolished. Laws of 1867, ch. 455. The constitutionality of these provisions have been questioned in *Griffin v. Griffith*, 6 How. 428, but was finally affirmed by the court of appeals in *Hayner v. James*, 17 N. Y. (3 Smith) 316.

c. Particular recorders. The recorder of Utica has the same power at chambers in respect to suits and proceedings cognizable before the recorder's court of Utica as those of a judge of the county courts. Laws of 1845, ch. 291, § 3. The recorder of Oswego has power to appoint a clerk of his own court (Laws of 1848, ch. 374, § 5) to exercise the same authority at chambers in respect to all suits and proceedings cognizable before his court as that of a judge of the county court in respect to proceedings in the county court. Laws of 1848, ch. 374, § 20. And by section 21 of the same chapter, he has the powers of a judge of the late court of common pleas, at chambers, or out of court. He has all the powers of a justice of the peace in criminal matters and pro-

Officers of the court — Same as other courts have.

ceedings. Laws of 1849, ch. 134. He may constitute a member of the court of oyer and terminer, and for that purpose has all the powers of a judge of the county court (Laws of 1857, ch. 96), and he may dispense with the drawing or summoning of jurors. Ib. The recorder of Hudson has the same power out of court as the county judge of Columbia county. Laws of 1830, ch. 43.

d. General power. Whenever any deed or conveyance is executed in this State, the acknowledgment or proof thereof may be taken by a recorder. 1 R. S. 756 (708), § 4, sub. 1.

And in general the powers conferred upon mayors of cities by the several statutes relating thereto, and which are noticed in the preceding section, are also, by the same statutes, conferred on the recorders of such cities. See § 1, *ante*, 363.

e. Disqualifications. No recorder shall practice as an attorney, solicitor, or counselor, in any court of which he shall be, or shall be entitled to act as, a member, or in any cause or proceeding originating in any such court; nor shall any partner of, or person connected in law business with, any recorder practice as an attorney, solicitor or counselor in any court of which such recorder shall be, or shall be entitled to act as, a member, or in any cause or proceeding originating in any such court. Laws of 1847, ch. 470, § 50.

ARTICLE IV.

OFFICERS OF THE COURT.

Section 1. Same as other courts have.

a. In general. These courts have the same ministerial officers as other courts of record have. In the mayors' courts of Hudson and Troy, the marshal and other ministerial officers of such cities, respectively, are to attend as often as shall be requisite, and are to obey and perform all the duties of their respective offices, as well when required by such courts, or any judge thereof, as otherwise. They are to execute and return all the writs and process of the said courts, to them respectively directed, in the same manner as the sheriff and other officers of any court of record in this State. 2 R. S. 216 (227, 228).

b. Oneida, sheriff. The sheriff of the county of Oneida, his under sheriff, or one of his deputies, or so many constables of the city of Utica as the recorder of such city may direct, are to

Terms of the court.

attend the sittings of the recorder's court of Utica. Laws of 1844, ch. 319, § 8. The clerk of this court is to be appointed by the recorder. Id., § 7.

c. Oswego, sheriff. The sheriff of the county of Oswego is charged with the duties of serving all process issuing out of the recorder's court of Oswego. Laws of 1848, ch. 374, § 16. And the clerk of such court is appointed by the recorder. Id., § 5.

ARTICLE V,

TERMS OF THE COURT.

Section 1. Hudson and Troy. The mayor's court of the city of Hudson shall be held on the last Tuesday of every month, and the terms thereof may continue to be held two days inclusive. 2 R. S. 218 (227), § 5. The mayor's court of the city of Troy shall be held on the first Tuesday of every month, at the court-house of the county of Rensselaer, in the said city, and may continue to be held for two days inclusive. 2 R. S. 218 (227), § 11. The several terms of the said courts shall respectively be called after the months in which they are held. 2 R. S. 219 (228), § 16.

Section 2. Oswego. The recorder's court of the city of Oswego shall be held once in each month, except in those months in which a circuit court of *oyer and terminer*, county court or court of sessions of the peace for the trial of civil or criminal causes, shall be authorized to be held in said city, at which a grand and petit jury shall have been called, and shall commence on the fourth Monday in each month. Laws of 1848, ch. 374, § 1; as amended by Laws of 1849, ch. 184.

Section 3. Utica. One term only of the recorder's court of the city of Utica is to be held in that city each year, and such term is to be held on the third Tuesday in March, and may continue for two weeks. Laws of 1849, ch. 184, § 18.

Removal to supreme court—Removal to county court—Power to make rules.

ARTICLE VI.

REMOVAL OF CAUSES.

Section 1. Removal to supreme court.

a. In what cases. The following actions, when pending in any mayor's court, may be removed by certiorari into the supreme court, by order of a judge of that court, or an officer empowered to perform the duties of such a judge out of court.

(a) All personal actions, where the debt or damages claimed, or the matter or thing in demand, exceeds the sum of \$250 ;

(b) All actions in which the people of this State are interested ;

(c) All actions by or against a city corporation ;

(d) All actions of ejectment ; and

(e) All other actions in which the title of real estate comes in question ;

(f) All actions of replevin ; and

(g) All actions for false imprisonment. 2 R. S. 389, §§ 1, 4, 5 (404).

Section 2. Removal to county court.

a. In what cases. Any action or proceeding pending in any mayor's or recorder's court, in which the judge is for any cause incapable of acting, may by such court be transferred to the county court of the county, and the papers on file shall be transmitted to such court, which shall thenceforth have jurisdiction thereof. Code, § 33, subd. 2.

ARTICLE VII.

RULES.

Section 1. Power to make rules.

a. Supreme court rules. The rules adopted by the supreme court in relation to proceedings for the discovery of books, papers, documents, etc., are binding upon these courts, except as the same may be modified by the rules of these courts respectively, as to the length of any notice, or the time in which any act is to be done. Laws of 1841, ch. 38, § 2. By the laws of 1870, provisions are made for revising, altering, abolishing and making rules of the supreme court, which shall be binding upon all courts of

Appeals from this court — Granting new trials.

record, so far as applicable thereto (Laws of 1870, ch. 408, § 13); and by rule 96, of the rules adopted pursuant to such provisions, it is provided, that the various courts of record and general terms may make such further rules in regard to the transaction of business before them respectively, not inconsistent with the foregoing rules, as they in their discretion may deem necessary. New Rule 96.

ARTICLE VIII.

APPEALS.

Section 1. Appeals from this court. An appeal from the judgments of these courts may be taken to the supreme court at general term. Code, § 344. Upon an appeal, under this section, from an inferior court to the supreme court, the latter possesses no other power than formerly upon a writ of error, and hence, upon such an appeal from a mayor's court, the judgment below cannot be reversed, because the jury have given excessive damages. *Thurber v. Townsend*, 22 N. Y. (8 Smith) 517.

Section 2. Granting new trials.

a. In general. New trials may be granted by the mayor's courts, on the ground that the jury has given excessive damages. *Thurber v. Townsend*, 22 N. Y. (8 Smith) 517. So a new trial or the setting aside of a judgment entered on the report of a referee, may be granted. *People v. Austin*, 43 Barb. 313.

b. Appeals from justices in summary proceedings. All appeals from proceedings before or decisions by any justice of the peace in summary proceedings for the recovery of land and tenements situated within the city of Utica, may be taken to the recorder's court of that city. Laws of 1845, ch. 291, § 3: 3 R. S. (5th ed.) 342.

CHAPTER XIII.

CITY COURT OF BROOKLYN.

ARTICLE I.

ORGANIZATION.

Section 1. Historical. This court was organized by an act of the legislature passed in 1849. It was established as a court of record under the name of "The city court of Brooklyn." Laws of 1849, ch. 125.

It then consisted of a city judge, who was elected for the term of six years at the charter election of the city, but the mayor and any two aldermen of the city had power to hold the court in case of the absence, inability to attend, or vacancy in the office of the city judge. It was provided that the judge so elected might be removed in the same manner as a county judge. Laws of 1849, ch. 125.

The court had criminal jurisdiction to the same extent as courts of sessions in the various counties of the State. *Ib.*

It remained under this organization until 1870, when the number of judges was increased and its jurisdiction was enlarged. Laws of 1870, ch. 470.

Section 2. Present organization.

a. Number of judges. By an act passed April 28, 1870, the number of judges of this court was increased to three, the election of two additional judges being provided for by that act, and the power of the mayor and aldermen of the city to sit in the court was taken away. Laws of 1870, ch. 470, §§ 1, 2.

b. Term of office. The judges are elected for the term of fourteen years from and including the first day of January next after their election, but no person can hold the office of judge longer than until and including the last day of December next after he shall be seventy years of age. Const., art. 6, § 13.

c. Compensation. Each of the justices receives a salary, which is fixed by the supervisors of the county of Kings, and which cannot be diminished during their term of office. Const., art. 6, § 14; Laws of 1870, ch. 470, § 12.

Certificate of term, vacancies — Juries.

d. Certificate of term, vacancies. It is the duty of each judge, before he enters upon the duties of his office, to make and sign a certificate, which must be filed in the office of the secretary of state, stating his age and when his official term will expire. When vacancies occur by the effluxion of time or the disability of age, they are filled at the preceding general election. Laws of 1870, ch. 86, §§ 8, 9.

Vacancies otherwise occurring are filled for a full term at the next general election, happening not less than three months after such vacancy occurs, and until so filled, the governor, with the concurrence of the senate, or if the senate is not in session, the governor may appoint to fill such vacancy. Any such appointment shall continue until and including the last day of December next after the election at which the vacancy shall be filled. Laws of 1870, ch. 86, § 9; Const., art. 6, §§ 9, 12.

e. Chief judge. The judges of the court choose from their own number a chief judge who acts as such during his official term. Const., art. 6, § 12.

f. Court of record. The court possesses a seal and is declared to be a court of record. Laws of 1850, ch. 102, § 4; Laws of 1870, ch. 470, § 2.

Section 3. Juries.

a. Lists to be made. The mayor, with the assessors of the several wards of the city in the month of May in each year, must make and file with the clerk of the court lists of the residents of the city who are qualified to sit as grand and petit jurors. Laws of 1849, ch. 125, § 15.

b. Jury, how drawn. From these lists the grand and petit jurors are drawn by the clerk of the court in the presence of a judge of the court, or one of the aldermen of the city. The jurors must be summoned at least four days before the term of the court at which they are to sit. Laws of 1849, ch. 125, §§ 16, 17.

c. New panel. The court may, during any term when it is deemed necessary, order a new panel of thirty-six jurors to be drawn, who must be drawn and summoned at least two days before the time when they are required to attend, and upon their attendance the former jurors must be discharged. Laws of 1849, ch. 125, § 18.

d. Compensation. Petit jurors are allowed twelve and a half cents in civil cases for each cause in which they are sworn as jurors, and in addition the same compensation as is allowed for

Original jurisdiction.

similar services in the other courts of record in Kings county. Laws of 1850, ch. 102, § 8.

ARTICLE II.

JURISDICTION.

Section 1. Original.

a. *In general.* The city court of Brooklyn has jurisdiction of the following actions and proceedings, where the cause of action has arisen or the subject thereof is situated within the city of Brooklyn :

1. For the recovery of real property or of any interest therein, or for the determination in any form of such right or interest, and for injuries to real property.

2. For the partition of real property.

3. For the foreclosure or satisfaction of a mortgage of real or personal property. See *Griswold v. Atlantic Dock Company*, 21 Barb. 225.

4. For the recovery of personal property distrained for any cause.

5. Its jurisdiction extends to all other actions where the cause of action has arisen in said city, or where any of the defendants reside or are personally served with the summons within the said city.

6. To actions against corporations created under the laws of this State, and transacting their general business within the said city, or established by law therein. See *Crofut v. The Brooklyn Ferry Company*, 36 Barb. 201.

7. To actions for the partition of the real estate of infants, in which actions this court has the same jurisdiction as is given to the supreme court by section 1 of chapter 277 of the Laws of 1852.

8. For the admeasurement of dower.

9. For the sale, mortgage or other disposition of real property of infants, habitual drunkards, lunatics, idiots and persons of unsound mind.

10. To compel the specific performance by infant heirs or other persons, of contracts respecting real property and chattels real.

11. For the mortgage or sale by religious corporations of their real property, and the application of the proceeds thereof.

Appellate jurisdiction — Powers of the court.

12. To actions against corporations created by or under the laws of another State, government or country, which have property in said city, or an agency established therein.

13. For the care and custody of idiots, lunatics, persons of unsound mind and habitual drunkards, and of their real and personal estate. Laws of 1870, ch. 470, § 2.

This court is an inferior court, and of limited jurisdiction. Its records of judgments should show all the facts necessary to give the court jurisdiction. *Simmons v. De Barre*, 8 Abb. 269; 4 Bosw. 547. See, also, *Lawrence's Case*, 18 Abb. 347.

Section 2. Appellate.

a. Appeals in city court. See article 8 of this chapter.

b. Appeals from inferior courts. This court has no appellate jurisdiction over the determinations of inferior courts.

ARTICLE III.**POWERS OF THE COURT AND OF THE JUDGES.****Section 1. Of the court.**

a. In relation to actions. This court possesses the same powers and authority in relation to actions therein, and the process and proceedings in such actions, as is possessed by the supreme court in relation to actions pending in that court. Laws of 1870, ch. 470, § 4.

b. In relation to judgments. This court has the same power over the dockets of its judgments in the office of any county clerk, and over any county clerk in respect to the same, as is possessed for the time being by the supreme court in respect to the dockets of judgments in that court. Laws of 1849, ch. 125, § 5.

c. In criminal matters. When organized as a criminal court, it possesses the same powers as courts of oyer and terminer in any county of this State, in the indictment and trial of offenses committed within the city of Brooklyn. Laws of 1870, ch. 470, § 8.

d. Appointment of clerk. The court may appoint a clerk and as many deputies as may be necessary for the transaction of its business. Laws of 1870, ch. 470, § 19.

e. Affirmative relief. In actions committed to its jurisdiction, its powers extend to matters of equitable cognizance as well as those at law, and it may grant to the defendant any affirmative

Powers of the judges.

relief to which he may be entitled. *McNulty v. Prentice*, 25 Barb. 204 (215).

f. Setting aside judgment. The court may entertain a motion to set aside a judgment for irregularity, even when such judgment was entered upon an *ex parte* application to the court. *Richardson v. Bates*, 23 How. 516.

Section 2. Of the judges.

a. In relation to actions, process, etc. Each of the judges of the court possesses the same powers and authority in relation to actions, process and proceedings therein as is possessed by any justice of the supreme court in relation to actions or proceedings in that court, and the laws relating to the supreme court and the practice therein are binding upon the judges of this court so far as they are applicable. Laws of 1870, ch. 470, § 4.

b. At chambers. Each of the judges of the court has the same powers and authority at chambers, in relation to proceedings in this court, as the justices of the supreme court have, or may be authorized to exercise, in respect to proceedings in that court. Laws of 1870, ch. 470, § 13.

They may also exercise, within the city of Brooklyn, all the powers of a justice of the supreme court at chambers. *Ib.*

c. Criminal term. Either of the judges may hold the criminal term. Laws of 1870, ch. 470, § 8.

d. Supreme court commissioner. It has been held that, by conferring upon the judges of this court the powers of a justice of the supreme court at chambers, it was not intended to confer also his powers as a supreme court commissioner, and hence that a judge of this court has no power to grant a writ of *habeas corpus*, running into another county, without proof that there is no officer in such county authorized to grant the writ. *Dooley's Case*, 8 Abb. 188.

e. Supplementary proceedings. The judges of this court have no jurisdiction over supplementary proceedings in actions not pending in their own court. *Cushman v. Johnson*, 13 How. 495; S. C., 4 Abb. 256.

f. Change of judges. Any proceeding commenced before one judge of the court may be continued before any other, except that whenever an appealable order is made in an action by any of the judges, all subsequent proceeding in that action, except at general term, must be had before the same judge. Laws of 1870, ch. 470, §§ 14, 15.

Clerk — Stenographer — Sheriff and constables.

Section 3. Of referees. Referees appointed by the court have no authority to try causes out of the city of Brooklyn. Per LOTT, J., *Bonner v. McPhail*, 31 Barb. 106, 112.

ARTICLE IV.

OFFICERS.

Section 1. Clerk.

a. Appointment, term of office. The clerk of the court is appointed by the judges and holds office during the pleasure of the court. Laws of 1870, ch. 740, § 19.

The appointment of deputies is also provided for by statute. *Ib.*

b. Compensation. The board of supervisors of Kings county is authorized to fix the salaries of the clerk and deputies, which are to be paid quarterly by the county treasurer and are a county charge. Laws of 1870, ch. 470, § 20.

He is entitled to receive the same fees as the county clerk, but must pay them to the county treasurer (Laws of 1850, ch. 102, § 2), and cannot retain the fees for any official service. *The People ex rel. Whittemore v. Seabury*, 23 How. 121.

c. Satisfaction of judgments. He may take acknowledgments of satisfaction of judgment in the city court, to be recorded in any county where such judgments may be recorded. Laws of 1850, ch. 102, § 2.

Section 2. Stenographer. The court has a stenographer, whose duty it is to take verbatim minutes of testimony in all trials had in the court, and also of the charge of the judge at such trials. He must keep minutes of all proceedings had at trials, which, upon the direction of the judge, must be engrossed and filed. Laws of 1866, ch. 311, § 1.

He must write out copies of all minutes and proceedings taken by him, for the parties, at the rate of five cents per folio, and he must write out and furnish to the court such portions of the same as may be desired by the judge, free of charge. Laws of 1867, ch. 796, § 2.

He receives a salary of two thousand dollars per annum. *Id.*, § 1.

Section 3. Sheriff and constables. The sheriff of Kings county, his under sheriff, or one of his deputies, and as many of the constables of the city as may be directed by the court and

Attorneys — Terms.

summoned by the sheriff, must attend the sittings of the court, and they are paid by the county treasurer the same compensation as is allowed by law to constables for attending other courts of record. Laws of 1870, ch. 470, § 11.

Section 4. Attorneys. Attorneys when admitted to practice in the supreme court are entitled to practice in this court.

Their fees and costs are the same as are allowed and recovered for services in the supreme court. Laws of 1849, ch. 125, § 22 ; *Bird v. City of Brooklyn*, 2 Abb. N. S. 132.

ARTICLE V.

TERMS AND JUDGMENTS.

Section 1. Terms.

a. When open. The court is always open for the transaction of any business, for which no notice is required to be given to an opposing party. Laws of 1870, ch. 470, § 8.

b. Trial terms. At least ten terms must be held in each year for the trial of issues of law or fact. *Ib.*

c. General and special terms. As many general and special terms of the court may be held as the judges may appoint, and at such times as they may from time to time direct. Notices of the appointment must be published in the State papers and in a paper published at Brooklyn at least four months before the terms are held. *Ib.*

At least two judges are necessary to constitute a general term. *Ib.*

d. Absence of judges. In case of the absence of all the judges on the day appointed for a term to be held, the clerk may, after two o'clock in the afternoon, open the court and adjourn the same until ten o'clock in the forenoon of the next day, whereon the said court can be lawfully held, and all process and proceedings are continued until that time. *Ib.*

e. Continuance of proceedings. Any proceeding commenced before one judge of the court may be continued before any other, except that when an appealable order is made in an action by any of the judges, all subsequent proceedings in that action, except at general term, must be had before the same judge. Laws of 1870, ch. 470, §§ 14, 15.

Judgments—Removal of causes.

Section 2. Judgments.

a. Judgments at general term. The concurrence of two judges qualified to sit at general term is necessary to pronounce a judgment of reversal at general term, and, if two do not concur in such reversal, the judgment or order appealed from must be affirmed unless a re-argument is ordered. Laws of 1870, ch. 470, § 5.

b. Effect of judgments. Judgments of this court may be docketed and are a lien in like manner and to the same extent as judgments in the supreme court. Laws of 1849, ch. 125, § 5.

The court has the same control over such dockets as the supreme court has over its own docket. *Ib.*

ARTICLE VI.**REMOVAL OF CAUSES TO SUPREME COURT.****Section 1. In what cases.**

a. Judges incompetent. Any action or proceeding may be transferred to the supreme court when all the judges of the court are incompetent to act therein by reason of having acted as counsel or attorney, or are interested, or are related to either of the parties. Laws of 1870, ch. 470, § 16.

b. How removed. If such disability exists, the judges must make a certificate of the fact and file it with the clerk of the court and with the clerk of Kings county, and thereupon the jurisdiction of such action or proceeding is vested in the supreme court. Upon the filing of such certificate with the clerk of the court, all papers in his office relating to the action or proceeding must be transferred to the office of the clerk of Kings county to there be filed. Laws of 1870, ch. 470, § 16.

c. Proceedings after removal. Kings county is the place of trial of any action so removed, and the action must thereafter be prosecuted and entitled in the supreme court as though it had been originally commenced therein. Laws of 1870, ch. 470, § 16.

d. Removal of appeals. When any appeal is pending at the general term of this court, if two of the judges are incompetent to sit for any of the reasons already stated, or if the appeal is from a decision of one of the judges and one of the others is incompetent, then upon filing with the clerk of the court, and with the Kings county clerk a certificate stating such fact, jurisdiction of such appeal shall thereupon be vested in the general term of the

supreme court with the like effect as an appeal from a judgment or order of any judge or special term of that court. Laws of 1870, ch. 470, § 17.

ARTICLE VII.

RULES.

Section 1. Supreme court rules. All laws regulating the practice of the supreme court, and the general rules of that court, are binding upon the city court of Brooklyn, so far as they are applicable to the transaction of its business. Laws of 1870, ch. 470, § 4; Laws of 1870, ch. 408, § 13. The chief judge of this court is entitled to a seat in the convention of judges, which meets every two years to revise the rules. Laws of 1870, ch. 408, § 13.

Section 2. Further rules. The court may, in its discretion, make such further rules as it may deem necessary in regard to the transaction of business before it, provided they are not inconsistent with the general rules of the supreme court. General Rules, 96.

ARTICLE VIII.

APPEALS.

Section 1. Appeals from.

a. To supreme court. An appeal may be taken to the general term of the supreme court from any judgment or final determination of this court at general term, or from any intermediate order involving the merits and necessarily affecting the judgment in any action.

1. Where the plaintiff's judgment is less than \$1,000, exclusive of costs.

2. Where the action is to recover the possession of personal property of less than \$1,000 in value.

3. Where, in an action for money, the amount claimed is less than \$1,000, exclusive of costs. Laws of 1870, ch. 470, § 6.

The provisions relative to appeals from courts of inferior jurisdiction to the supreme court, apply to these appeals. *Ib.*

The decision of the supreme court, affirming the determina-

Appeals to general term.

tion appealed from, is final, unless it allows an appeal to the court of appeals. *Ib.*

An order setting aside a verdict and granting a new trial, is one from which an appeal will lie to the supreme court, although the order is entered and the appeal taken before judgment. *Gannon v. Campbell*, 19 Abb. 164, note; *Moore v. Wood*, 19 How. 405; *Bennett v. The City of Brooklyn*, *id.* 310.

b. To the court of appeals. In all actions other than those in which an appeal will lie to the supreme court, an appeal may be taken from an actual determination of this court at general term to the court of appeals in the cases provided by section 11 of the Code. Laws of 1870, ch. 470, § 7.

All provisions of law relative to appeals to the court of appeals apply to these. *Id.*

Section 2. Appeals to general term.

a. When they may be taken. Appeals may be taken to the general term of this court, upon the law, from a judgment entered upon the report of referees, or the direction of a single judge, in all cases; appeals upon the facts may be taken when the trial is by the court or referees. Laws of 1870, ch. 470, § 5.

Appeals may be taken to the general term from an order made at special term, or by a single judge of the court, in the cases provided by section 349 of the Code, and all the provisions of chapter 4, title 11, of the Code, apply to such appeals. *Ib.* See § 2, art. 5 of this chapter, *ante*, 378.

b. Removal of appeals. Appeals to the general term of this court may be removed to the general term of the supreme court, when the judges are not competent to act therein. Laws of 1870, ch. 470, § 17. See article 6 of this chapter.

Section 3. Appeals from inferior courts. This court has no appellate jurisdiction over the determinations of inferior courts.

CHAPTER XIV.

COUNTY COURTS.

ARTICLE I.

ORGANIZATION.

Section 1. Early courts in this State. Under the name of the court of common pleas, the county courts were established by an act of the general assembly passed in the year 1691, which was the first year of the regular government of the Province of New York ; hence it is one of the oldest judicial organizations of the State, its establishment being coeval with the earliest judicature.

The act was passed originally to continue two years, and was re-enacted from time to time until 1697, when it was permanently continued and was never repealed. See Paine and Duer's *Prac.*, Appendix.

In its early organization there was one judge with three justices in each county, appointed and commissioned by the general assembly to hold the court, three of whom constituted a quorum. Colonial Session Laws (Bradf. ed. of 1694), 2, 64.

The section under which this court was organized was as follows : " And for the more regular and beneficial distribution of justice to the inhabitants of each respective city and county within this province. Be it further enacted by the authority aforesaid, that there be kept and held a court of common pleas in each respective city and county within this province, at the times and places hereafter named and expressed : That is to say, at such places in each respective county as the said court of sessions is to be kept, and to begin the next day after the sessions terminates, and only to hold and continue for the space and time of two days and no longer ; and that there be one judge, with three justices, in each county, appointed and commissioned to hold the same court of pleas, three whereof to be a quorum. And that the several and respective courts, hereby established, shall have jurisdiction to hear, try, and finally to determine all actions or cause of actions, and all matters, and things, and causes triable at the common law, of what nature or kind soever."

Court before 1846 — Under constitution of 1846.

A reprint of the entire act may be found in the appendix to Paine & Duer's Practice (see 2 Paine & Duer's Pract. 716), which is not only historically curious, but also very important, as it is the outline or framework of that judicial system which, under our free institutions, has grown to such beautiful proportions. The only original copy extant is found in Bradford's Colonial Session Laws, edition of 1694, cited above.

From this time to the establishment of the State government these courts remained, substantially, under the same organization; and, with but few changes which were rendered necessary by the new State constitution, they were continued to the time of the Revised Statutes in the year 1830.

Section 2. Court before 1846.

a. In general. By the Revised Statutes these courts were re-organized and continued. They provided, that there shall continue to be a court of common pleas in each county of this State, which shall possess the powers and exercise the jurisdiction which belonged to the courts of common pleas of the several counties of the colony of New York, with the additions, limitations and exceptions, created and imposed by the constitution and laws of this State. The court at this time consisted of five judges in each county of the State, except the city and county of New York (see Common Pleas of New York), a first judge and four judges of the common pleas who were appointed by the governor with the consent of the senate, and who held their office for five years. Amend. Const. of 1828(1), art. 6, § 7; *id.*, art. 5, § 6. These judges, or any three of them, were empowered to hold the court of common pleas in their respective counties. 2 R. S. (208) 217, § 2. Beside this, authority was given by other statutes, to the first or some other judge under certain circumstances and for specific purposes to hold the court alone. Graham on Jurisdiction, 76. The court was, at this time, a court of record (*Foot v. Stevens*, 17 Wend. 483), and it continued under such organization until the adoption of the constitution of 1846, when it was re-organized and materially altered.

Section 3. Under constitution of 1846.

a. In general. The constitution of 1846 provided for the election in each of the counties of the State, except the city and county of New York (see Common Pleas of New York), of one county judge, who was authorized to hold the county court, etc. Const. of 1846, art. 6, § 14. This officer was elected for the term

Present organization.

of four years, and received a salary fixed by the board of supervisors of the respective counties, and which could not be increased or diminished during his continuance in office. *Ib.*

In case of the inability of the county judge to act, or in case of a vacancy, the legislature was empowered to provide for the election of an officer to discharge the duties of the office. Const. of 1846, art. 6, § 15.

These courts were courts of record, each having a clerk and seal. See *Kundolf v. Thalheimer*, 17 Barb. 506; S. C. reversed on the merits, 12 N. Y. (2 Kern.) 593; 2 R. S. 210 (219), §§ 12, 14.

Thus organized they remained (see 4 Stat. at Large, Edm. Ed. 564; Laws of 1847, ch. 470), until the adoption of the amended judiciary article of 1869.

Section 4. Present organization. By the sixth article of the constitution, as ratified and adopted December 6, 1869, the county courts were continued as they at that time existed so far as their powers and jurisdiction were concerned. Const., art. 6, § 15.

The judges in office at that time were continued until the expiration of their respective terms, and their successors were authorized to be chosen by the electors of the several counties for the term of six years. *Ib.*

The compensation of the county judge is to be established by law, and such salary cannot be diminished during his term of office. Const., art. 6, § 15. In case of the inability of the county judge to act, or in case of a vacancy, the legislature may, on application of the board of supervisors, provide for the election of an officer to perform the duties of county judge. Const., art. 6, § 16. The county judge is not permitted to receive to his own use any fees or perquisites of office. Const., art. 6, § 21. These officers may be removed by the senate, on the recommendation of the governor, if two-thirds of all the members elected concur therein; but the cause thereof must be entered in the journals, and the party complained of must have an opportunity of being heard. Const., art. 6, § 11. The county judge of any county may preside at courts of sessions, or hold county courts in any other county, except New York and Kings, when requested by the judge of such other county. Const., art. 6, § 15.

ARTICLE II.

JURISDICTION.

Section 1. Early jurisdiction. The court of common pleas, as it was at first organized, was a court of general law jurisdiction, the provision conferring it being as follows: "And that the several and respective courts, hereby established, shall have jurisdiction to hear, try, and finally to determine, all actions or cause of actions, and all matters and things, and causes triable at the common law, of what nature or kind soever." Colonial Session Laws (Bradf. ed. of 1694), 2, 64; 2 Paine & Duer's Prac. 718. From the time of the organization of these courts down to the establishment of the State government, they continued to exercise substantially the same powers with which they were originally vested. Graham on Jurisdiction, 73.

Section 2. Jurisdiction before 1846.

a. General jurisdiction. Under the Revised Statutes the courts of common pleas were vested with all the powers, and were authorized to exercise the same jurisdiction which belonged to those courts under the colonial government, with the additions, limitations and exceptions, created and imposed by the constitution and laws of the State. 2 R. S. 208 (217), § 1.

They were also expressly authorized to hear, try, and determine, according to law, all local actions arising within the respective counties where such courts were held, and all transitory actions in whatever county the cause thereof arose. Ib.

Thus they were invested with power to hear and determine every description of real and personal action, and that, whether local or transitory. See Graham on Jurisdiction, 80. Besides this they were authorized to grant new trials in actions tried therein. 2 R. S. 208 (217), § 1.

b. Special jurisdiction. By special jurisdiction is to be understood that jurisdiction which was expressly conferred by statute, concerning proceedings not strictly within the denomination of *actions*, and it includes:

I. Voluntary assignments by imprisoned debtors. 2 R. S. 31, § 1.

II. The care and custody of the persons and estates of habitual drunkards. 2 R. S. 208 (217), § 1.

Appellate jurisdiction.

III. The remitting of fines and forfeited recognizances. 2 R. S. 508 (486), § 37.

IV. The admeasurement of dower. 2 R. S. 510 (488), § 1.

V. Proceedings on attachments against absconding, concealed or non-resident debtors. 2 R. S. 10, § 43, *et seq.*; *id.* 35, § 1.

VI. Proceedings for the removal of justices of the peace. 1 R. S. 101 (110), § 35. Commissioners of deeds in towns. *Id.*, § 31. Special justices and assistant justices and their clerks in the city of New York. *Id.*, § 34.

Proceedings for the licensing of ferries, 1 R. S. 486 (526). For the regulation of fisheries, 1 R. S. 642 (688). Concerning turnpike roads, 1 R. S. 538 (581). Wrecks, 1 R. S. 643 (690). Physicians, 398 (452). Jail liberties, 2 R. S. 450 (432). The removal of occupants from State lands, 1 R. S. 206. The laying out of railroads through Indian lands, Laws of 1836, ch. 316. Appeals from commissioners of highways, 1 R. S. 477 (518). Proceedings for the partition of lands, 2 R. S. 324 (316), and for the disposal of the estates of habitual drunkards when such estate amounted to less than \$250, 2 R. S. 53.

It may be noticed here generally that in local actions the powers of the court did not extend beyond their respective counties, while in transitory actions they had general cognizance wherever the cause of action arose. Graham on Jurisdiction, 110.

This included all of the matters of which the court had original jurisdiction and extended as it was, still the common pleas was considered an inferior court, and it was bound to obey a *mandamus*, prohibition, or attachment issuing from the supreme court. *The People v. Sessions of Chenango*, 1 Johns. Cas. 179; S. C., 2 Caines' Cas. 319. See Graham on Jurisdiction, 90.

c. Appellate jurisdiction. The court of common pleas had also certain jurisdiction over the judgments of justice's courts, which were removed for review either by *certiorari* or by appeal.

Proceedings by *certiorari* would lie in all cases of judgments rendered before a justice of the peace where the debt or damages recovered did not exceed \$25 exclusive of costs, and in all cases where issue was not joined before the justice. 2 R. S. 255, § 170.

Proceedings by appeal might be had to the common pleas to review justice's judgments which exceeded \$25, exclusive of costs, in the following cases: 1. Where the judgment was rendered upon an issue of law joined between the parties. 2. Where it was rendered upon an issue of fact joined between the parties

Jurisdiction under constitution of 1846.

whether the defendant was present at the trial or not. 2 R. S. 258, § 186; *The People v. Schoharie Common Pleas*, 2 Wend. 260.

d. Proceedings on appeal. Upon every matter so brought into the court of common pleas, that court proceeded to decide according to the law of the case, if it was an issue of law. 2 R. S. 262, § 212. And if it was an issue of fact the court proceeded to try the same by jury, or it ordered a reference. *Id.*, § 213. See Reference. It was held that although the plaintiff was limited in the justice's court to a recovery of \$50, yet, if the defendant appealed to the common pleas, that court might give the plaintiff judgment for all the claims he might prove, although beyond that sum. *Jackson v. Covert's Administrators*, 5 Wend. 139.

Section 3. Jurisdiction under constitution of 1846.

a. Special cases. The constitution of 1846 limited the jurisdiction of these courts to such as the legislature might prescribe over cases arising in justices' courts, and in *special cases*. Const. of 1846, art. 6, § 14.

The court of appeals construed the words "special cases" to mean "special proceedings," and that the term did not include common-law actions. *Kundolf v. Thalheimer*, 12 N. Y. (2 Kern.) 593. But see *Arnold v. Rees*, 18 N. Y. (4 Smith) 57 (66); S. C., 17 How. 35; 7 Abb. 328; *Doubleday v. Heath*, 16 N. Y. (2 Smith) 80; *People v. Main*, 20 *id.* 434.

By the judiciary act of 1847, and until the enactment of the Code, the jurisdiction of the county courts was defined as follows: That they should have jurisdiction to hear, try, and determine all matters and proceedings specially conferred by statute upon, and heretofore triable and cognizable by, courts of common pleas. But nothing contained in that provision was to be deemed to confer original jurisdiction upon any county court, in any action known to the common law. 4 Stat. at Large, 564, § 29; Laws of 1847, ch. 280, § 29.

The county court in each county shall have power to hear, try and determine according to law:

1. Suits and proceedings by *scire facias* to revive any judgment in said court, or one rendered in the common pleas of that county, or to have execution of such judgments, or to revive any suit in said county court.
2. Suits and proceedings for the admeasurement of dower or

Equity and appellate jurisdiction.

for the partition of lands, when the lands are situated in the county where the court is held.

3. When all the defendants, at the time of commencing the action, reside in the county in which the court is held; of actions of debt, assumpsit and covenant, when the debt or damages claimed do not exceed \$2,000; actions for assault and battery and false imprisonment, when the damages claimed do not exceed \$500; actions of trespass and trespass on the case to amount of \$500; actions of replevin when the value of the property claimed does not exceed \$1,000, and also to grant new trials in all such suits or proceedings. 4 Stat. at Large, 564, § 30; Laws of 1847, ch. 280, § 30.

According to the construction of the words "special cases" in the constitution, so much of this section as proposed to confer jurisdiction of common-law actions, as distinguished from special proceedings, was held to be unconstitutional. *Kundolf v. Thalheimer*, 12 N. Y. (2 Kern.) 593.

b. Equity jurisdiction. There was also conferred equity jurisdiction in the following cases:

1. For the foreclosure of mortgages, when the mortgaged premises are situated in the county. See *Arnold v. Rees*, 18 N. Y. (4 Smith) 57; S. C., 17 How. 35; 7 Abb. 328; overruling *Hall v. Nelson*, 23 Barb. 88; S. C., 14 How. 32.

2. For the sale of the real estate of infants, when the real estate is situated and the infants reside in the county.

3. For the care and custody of lunatics and habitual drunkards, residing in the county.

4. For the satisfaction of judgments and decrees on which there shall remain due a sum exceeding \$75, out of the property of a debtor when an execution has been returned unsatisfied, and the debtor resides in the county.

5. For partition of lands in the county. See *Doubleday v. Heath*, 16 N. Y. (2 Smith) 80.

6. For the admeasurement of dower in lands in the county. 4 Stat. at Large, 564, § 31; Laws of 1847, ch. 280, § 31.

c. Appellate jurisdiction. The county court of such county, under the judiciary act of 1847, possessed and exercised the same jurisdiction, in all cases of appeals from judgments rendered by justices of the peace, and of writs of *certiorari* to remove the same, as courts of common pleas then had and exer-

Jurisdiction — Under the Code.

cised. 4 Stat. at Large, 565, § 35; Laws of 1847, ch. 280, § 35; § 2 of this article.

d. Under the Code. Upon the adoption of the Code of Procedure, all statutes then in force, conferring or defining the jurisdiction of the court, so far as they were in conflict with the provisions of the Code, were repealed, and the provisions of the 30th section of that act were substituted. Code, § 29.

An enumeration of the actions of which county courts might take cognizance, was given, to which it will satisfy our present design to refer briefly: 1. Of all civil actions for the recovery of not exceeding \$500, and for the recovery of personal property not exceeding that amount in value. See *Kundolf v. Thalheimer*, 12 N. Y. (2 Kern.) 593. This subdivision did not apply to the counties of Kings and Erie. Code, § 31. 2. The exclusive power to review and to affirm, reverse or modify justices' judgments. 3. The foreclosure or satisfaction of mortgages, and the sale of mortgaged premises, situated within the county, and the collection of any deficiency in the mortgage, after the sale. 4. The partition of real property, situated within the county. 5. The admeasurement of dower in lands situated within the county. 6. The sale, mortgage, or other disposition of the real property, situated within the county, of an infant, or person of unsound mind. 7. To compel the specific performance by an infant, heir, or other person, of a contract made by a party who shall have died before the performance thereof. 8. The care and custody of the person and estate of a lunatic or habitual drunkard, residing within the county. 9. The mortgage or sale of the real property, situated within the county, of a religious corporation, and the disposition of the proceeds. 10. To exercise the power and authority, theretofore vested in the common pleas, over judgments rendered by justices of the peace, transcripts of which have been filed with the county clerk. 11. To exercise the same powers and jurisdiction as was exercised by the court of common pleas, respecting ferries, fisheries, turnpike roads, wrecks, physicians, habitual drunkards, imprisoned, insolvent, absent, concealed, or non-resident debtors, jail liberties, the removal of occupants from State lands, the laying out of railroads through Indian lands, upon appeal from determinations of commissioners of highways, and all other jurisdiction conferred upon the common pleas or county court by statute, and remaining unrepealed, except in the trial and determination of civil

Present jurisdiction.

actions. 12. To remit fines and forfeited recognizances. 13. To grant new trials, or affirm, modify, or reverse judgments in actions tried therein, upon exceptions or case made, subject to an appeal to the supreme court. Code, § 30.

They also had jurisdiction of naturalization proceedings. *The People v. Pease*, 30 Barb. 588.

But it will be seen that the court, under the constitution of 1846, was not, as was the old court of common pleas, a court of general jurisdiction, but it was a new court, with a limited statutory jurisdiction, and the court of appeals held that the record should show all the facts necessary to confer jurisdiction. *Frees v. Ford*, 6 N. Y. (2 Seld.) 176.

The county court had, prior to the amendment of 1858, jurisdiction to try an action defeated in the justice's court upon the interposition of a plea of title. *Cook v. Nellis*, 18 N. Y. (4 Smith) 126.

Section 4. Present jurisdiction.

a. In general. The 6th article of the constitution, as adopted in 1869, extends the jurisdiction of the county courts far beyond the limits which prescribed its powers under the constitution of 1846. By the provisions of the new constitution they now have, in addition to the powers and jurisdiction they previously possessed, original jurisdiction in all cases where the defendants reside in the county, and in which the damages claimed shall not exceed \$1,000. Also, such appellate jurisdiction as shall be provided by law, and such other original jurisdiction as shall, from time to time, be conferred upon them by the legislature. Const., art. 6, § 15.

b. Original jurisdiction. The jurisdiction of county courts extends to the following cases :

I. Civil actions in which the relief demanded is the recovery of a sum of money not exceeding \$1,000, or the recovery of personal property not exceeding in value \$1,000, and in which all the defendants are residents of the county in which the action is brought at the time of its commencement; subject to the right of the supreme court, upon special motion, for good cause shown, to remove any such action into the supreme court before trial. Laws of 1870, ch. 467, § 1.

II. The foreclosure or satisfaction of a mortgage, and the sale of mortgaged premises situated within the county, and the collection of any deficiency on the mortgage remaining unpaid,

Original jurisdiction.

after the sale of the mortgaged premises. Code, § 30. See *Arnold v. Rees* 18 N. Y. (4 Smith) 57; S. C., 17 How. 35; 7 Abb. 328.

III. The partition of real property situated within the county. Code, § 30. See *Doubleday v. Heath*, 16 N. Y. (2 Smith) 80.

IV. The admeasurement of dower in land situated within the county.

V. The sale, mortgage or other disposition of the real property situated within the county, of an infant or person of unsound mind.

VI. To compel the specific performance by an infant heir, or other person, of a contract made by a party who shall have died before the performance thereof. Code, § 30. See *Williston v. Williston*, 41 Barb. 635.

VII. The care and custody of the person, and estate of a lunatic or person of unsound mind, or an habitual drunkard, residing within the county. Code, § 30.

The jurisdiction conferred over habitual drunkards is general, and not limited to those having estates of less than \$250. *Davis v. Spencer*, 24 N. Y. (10 Smith) 386; overruling *Matter of Smith*, 16 How. 567.

VIII. The mortgage or sale of the real property situated within the county, of a religious corporation, and the disposition of the proceeds thereof.

IX. To exercise the power and authority heretofore vested in the courts of common pleas, over judgments rendered by justices of the peace, transcripts of which have been filed in the offices of the county clerks in such counties. Code, § 30. See *People v. Judges of Washington County*, 1 Wend. 79.

X. To exercise all the powers and jurisdiction conferred by statute upon the late courts of common pleas of the county, or the judges or any judge thereof, respecting ferries, fisheries, turnpike roads, wrecks, physicians, habitual drunkards, imprisoned, insolvent, absent, concealed or non-resident debtors, jail liberties, the removal of occupants of State lands, the laying out of railroads through Indian lands, and upon appeal from the determination of commissioners of highways, and all other powers and jurisdiction conferred by statute, which has not been repealed, in the late court of common pleas of the county, or in the county court, since the late courts of common pleas were abolished, except in the trial and determination of civil

Appellate jurisdiction.

actions; and to prescribe the manner of exercising such jurisdiction, when the provisions of any statute are inconsistent with the organization of the county court. See §2 of this article, *ante*, 384, 385.

XI. To remit fines and forfeited recognizances in the same cases, and in like manner, as such power was given by law to courts of common pleas.

XII. To grant new trials, or affirm, modify or reverse judgments in actions tried in such court, upon exceptions, or case made, subject to an appeal to the supreme court. Code, § 30.

XIII. The county court has also jurisdiction of proceedings for the naturalization of aliens. *The People v. Pease*, 30 Barb. 588.

c. Appellate jurisdiction. The county courts also possess the exclusive power to review, in the first instance, a judgment rendered in a civil action by a justice's court in the county, or by a justice's court in cities, and to affirm, reverse or modify such judgment. Code, §§ 30, 352.

A new trial may be had in the county court when the claim or claims of either party in the court below, for which judgment was demanded, exceeded \$50, or in an action to recover possession of personal property where the value of the property as assessed and the damages recovered exceed \$50, exclusive of costs in the following cases:

When the judgment was rendered upon an issue of law joined between the parties.

When it was rendered upon an issue of fact joined between the parties, whether the defendant was present at the trial or not. Code, § 352.

But the appellant may, in the cases in which a new trial may be had, state in his notice of appeal that such appeal is taken upon questions of law only, in which case a new trial shall not be had, but the appeal shall be heard and determined upon argument, as in cases where a new trial cannot be had. Code, § 352

County courts may review the determinations of commissioners of highways (1 R. S. 477 [518], § 84; Laws of 1845, ch. 180), and of justices of the peace, in summary proceedings, to recover the possession of land. Laws of 1849, ch. 193.

. ARTICLE III.

POWERS.

Section 1. Early court. It will be remembered that, as it was at first organized, the court of common pleas was a court of *general law jurisdiction*, and as such possessed all the powers incidental to such a court. Laws, Bradford's ed. of 1694, 264. And from that period down to the establishment of the State government, they continued to exercise substantially the same powers. Graham on Jurisdiction, 73.

Section 2. Powers before 1846.

a. Powers of court. By the Revised Statutes these courts were re-organized, and possessed the powers, etc., which belonged to courts of common pleas of the several counties of the colony of New York, with the additions, limitations and exceptions created and imposed by the constitution and laws of the State. 2 R. S. 217 (208), § 1.

Beside the jurisdictional powers which have been enumerated in section 2 of the preceding article, this court possessed the general powers of a court of record, which were: 1. To issue process of subpoena, requiring the attendance of any witnesses residing or being in any part of this State, to testify in any matter or cause pending in the court. 2. To administer oaths to witnesses in any such matter or cause, and in all other cases, where it may be necessary, in the exercise of the powers and duties of the court. 3. To devise and make such new writs and forms of proceedings as may be necessary to carry into effect the powers and jurisdiction possessed by them. 2 R. S. (276) 287, § 1.

The appointment and removal of district attorneys also belonged to the common pleas. 1 R. S. 98 (108), § 15.

The court had no power to grant a writ of error *coram nobis* (*People v. Oneida Com. Pleas*, 20 Johns. 22), nor could it refer a cause appealed from a justice. *People v. Washington Com. Pleas*, 20 Johns. 363. See *Cowen v. Bush*, 3 Cow. 343; *Flower v. Allen*, 5 id. 654; *Hyland v. Loomis*, 48 Barb. 126.

It had power to grant a compulsory nonsuit (*Pratt v. Hull*, 13 Johns. 334), and*to set aside, as against evidence, a verdict or a referee's report. *Ex parte Bassett*, 2 Cow. 458.

Powers under constitution of 1846.

b. Powers of judges. The judges were empowered to take the acknowledgment of bail, and of satisfaction of judgment, in their own court, as well as in the supreme court (2 R. S. 293 [282], § 40), and the first judge of any county, and any other judge of the county court of the degree of counselor in the supreme court, could make any order in vacation, touching any suit or proceeding in the common pleas, in the same manner as a supreme court justice at chambers. 2 R. S. 292 (282), § 38. But no judge of the county court, other than those specified, could exercise these powers, except in case of the absence, death, or inability of those mentioned. *Id.*, § 39. The judges of the court had power to remove justices of the peace. 1 R. S. 101 (111), § 35. But it was in their power to take cognizance of charges or not. *Ex parte Johnson*, 3 Cow. 371.

Any judge of the court might grant an order staying proceedings on a justice's judgment until the court had an opportunity to inquire into its validity. 2 R. S. 263 (246), § 116.

Section 3. Powers under constitution of 1846.

a. In general. The county courts possessed the same powers that it had exercised previous to the constitution of 1846, except so far as they related to the jurisdiction of that court, over actions at law. Const. of 1846, art. 6, § 14; Laws of 1847, ch. 280, §§ 29, 30. See *Kundolf v. Thalheimer*, 12 N. Y. (2 Kern.) 593.

And all laws relating to the former court of common pleas, its powers and jurisdiction, and the powers and duties of its officers, were made applicable to the county court as then organized. Laws of 1847, ch. 280, § 36.

b. New trials. The court had power to grant new trials, or affirm, reverse, or modify judgments in actions tried in such court, upon exceptions or case made, subject to an appeal to the supreme court. Laws of 1847, ch. 280, § 30. Code, § 30.

This court had jurisdiction, upon the written consent of the parties, to order a reference in a case brought before it by appeal from a justice's court, where an issue of fact had been joined in the action. *Hyland v. Loomis*, 48 Barb. 126.

Section 4. Present powers.

a. Powers of court. Under the constitution, as amended in 1869, the county courts are continued with such powers and jurisdiction as they now possess, until altered by the legislature. Const., art. 6, § 15. And under the Code they exercise all

Powers of judges.

the powers conferred by statute, which have not been repealed, upon the late courts of common pleas of the county, and to prescribe the manner of exercising such jurisdiction when the provisions of any statute are inconsistent with the organization of the county court. Code, § 30, subd. 11. See § 4, art. 2 of this chapter, *ante*, 389 to 391.

These powers consist, in addition to those enumerated under the head of jurisdiction, in section 4 of the preceding article, of the general powers of courts of record, relating to process of subpoena, the administration of oaths and the devising and making of such new writs and forms of proceedings, as may be necessary to carry into effect the powers and jurisdiction possessed by them. 2 R. S. 276 (287), § 1.

The court may compel the discovery of books and documents in an action pending before it. Code, § 388.

In a proper case, a cause brought from a justice's court, on appeal, may be referred by the court. *Hyland v. Loomis*, 48 Barb. 126. See *People v. Washington Com. Pleas*, 20 Johns. 363; *Cowen v. Bush*, 3 Cow. 343; *Flower v. Allen*, 5 id. 654.

By the recent act, extending the jurisdiction of the court (Laws of 1870, ch. 467), it has the powers incident to a court of common law jurisdiction.

b. Powers of judges. County judges have certain powers vested in them, in special statutory proceedings, which it is not necessary to detail in this place, but to which a reference is given in section 2, article 2 of this chapter, *ante*, 384, 385.

c. Proceedings in county court. A county judge may make any order out of court, in any suit or proceeding pending before the court that a judge of the supreme court might make if the proceedings were pending in the latter court. 2 R. S. 292 (282), § 38.

d. Acknowledgments. They may take proof and acknowledgment of conveyances of real estate and the discharge of mortgages. The acknowledgment of bail in any action in the supreme or in the county court of their respective counties, and the acknowledgment and satisfaction of judgments in those courts. 2 R. S. 293 (282), § 40. See *People v. Hurlbutt*, 44 Barb. 126.

e. Proceedings in supreme court. In an action in the supreme court, a county judge may exercise within his county the powers of a judge of the supreme court at chambers. Code, § 403. See *People v. Hurlbutt*, 44 Barb. 126; *Woodruff v. The People*, 3

Powers of judges.

How. 32; *Peebles v. Rogers*, 5 id. 208; S. C., 3 Code R. 213. Thus he may grant an order *ex parte*, extending the time to answer, for more than twenty days. *Sisson v. Lawrence*, 25 How. 435; S. C., 16 Abb. 259, note. And any order in any action pending in the supreme court, or the county court, made out of court, without notice, may be made by the judge of the county where the action is triable, or in which the attorney for the moving party resides, except to stay proceedings after verdict. Code, § 401. See *Chubbuck v. Morrison*, 6 How. 367. A referee's report is not included in the latter exception. *Otis v. Spencer*, 8 How. 171.

f. Guardians ad litem. County judges may appoint a guardian *ad litem* for an infant party to an action brought in this or in any other court. Code, § 115; *Towsey v. Harrison*, 25 How. 266.

g. Further account. They may order a further account when the one rendered is defective. Code, § 158.

h. Supplementary proceedings. A county judge of the county to which an execution has been issued, has the same authority in supplementary proceedings therein as a judge of the court which rendered the judgment. Code, § 292.

i. Fraudulent judgments. Upon the application of a creditor of one who has confessed a judgment before a justice of the peace, the county judge may stay proceedings on such judgment until the county court has inquired into the consideration of the same. 2 R. S. 262 (246), § 116.

j. Assignees. The county judges have exclusive jurisdiction over proceedings for the appointment of assignees for the benefit of creditors in their respective counties. Laws of 1860, ch. 348.

k. Bail. A county judge may let to bail persons charged with crime, whether indicted or not, in all cases that a justice of the supreme court can let to bail. *People v. Hurlbutt*, 44 Barb. 126.

l. Vacating arrest. They have no power to hear a motion, on notice, to vacate an order of arrest in an action in the supreme court. *Rogers v. McElhone*, 20 How. 441; S. C., 12 Abb. 292.

m. Taxing costs. They may tax costs under the old fee bill, contained in the Revised Statutes, whenever such mode of taxation may be proper. *People ex rel. Lumley v. Lewis*, 28 How. 159.

ARTICLE IV.

OFFICERS.

Section 1. Early courts. Upon the establishment of the old court of common pleas, provision was made for certain officers, "for the more regular proceedings in the court." A copy of the section which authorized their appointment will sufficiently show their character and the nature of their duties: "To which respective courts of common pleas there shall belong, and be appointed and commissioned for that purpose, one clerk of the court, to draw, enter, and keep the records, declarations, pleas and judgments, then to be had and made, and one marshal, a crier of the court, to call the jurors and proclaim the commands and orders of the court." All processes and writs of what nature soever, were to be directed to the respective sheriffs of the several cities and counties within the province. And all processes and writs for actions between party and party were issued from the clerk's office, signed *per curiam*. Laws, Bradford's ed. of 1894, 264. See 2 Paine & Duer's Prac. 719.

Section 2. Court before 1846.

a. Sheriff. The sheriff of the county was the ministerial officer of the court. See 1 Paine & Duer's Prac. 233.

b. Clerk. The clerk of the county, or of the city and county, is by virtue of his office clerk of this court. 2 R. S. 219 (210), § 14; id. 225 (215), § 24. They were elected once in three years, or as often as vacancies occurred. 1 R. S. 103 (112), § 47. He was authorized to appoint a deputy clerk (1 R. S. 348 [376], § 56), and neither he nor his deputy could practice as counsel or as attorney in the courts of which they were clerks. 1 R. S. 99 (109), § 26. The clerk of the city and county of New York was required to file a bond in a penalty of \$15,000, conditioned that he would properly discharge the duties of his office. 2 R. S. 225 (215), § 24.

Section 3. Under constitution of 1846.

a. In general. By the judiciary act of 1847, all laws relating to the officers of the courts of common pleas and their duties were made applicable to the county courts as then organized. 4 Stat. at Large, 566, § 36; Laws of 1847, ch. 280, § 36.

Terms and judgments.

b. Crier. By that act it was made the duty of the sheriff and his subordinates to act as crier of the court. 4 Stat. at Large, 589, § 42; Laws of 1847, ch. 470, § 42. But by an act passed in 1855, the county judge was authorized to appoint a crier, who should hold his office during the pleasure of such judge. Laws of 1855, ch. 530; Laws of 1865, ch. 296. Except the city and county of New York (*Ib.* See Code, § 39) and the county of Dutchess, where the clerk of the county, and, in his absence, his deputy, perform the duties of crier.

Section 4. Present courts.

Under the constitution as amended in 1869, the officers of the court remain as they existed previous to that amendment.

ARTICLE V.

TERMS AND JUDGMENTS.

Section 1. Early courts.

a. Terms. As at first established, the courts of common pleas were held at the places where the courts of sessions were held in such county; they began the next day after the sessions terminated, and continued "for the space and time of two days, and no longer." They were held twice in each county, except the counties of Albany and New York; in Albany three times a year, and in New York four times. Laws, Bradford's ed. 1694, 264; 2 Paine & Duer's Prac. 718. See 1 E. D. Smith, Introduction, 49.

Section 2. Courts before 1846.

a. Terms. Under the Revised Statutes the terms were held in the various counties of the State, from two to four times each year (2 R. S. 220 [211], § 20; *id.* 226 [217], § 34), and might be continued to and including the second Saturday after their commencement. 2 R. S. 220 (211), § 19. But in the city and county of New York they were held every month. 2 R. S. 225 (216), § 26. Except where special provision was made otherwise the terms were held at the court-house of the county. 2 R. S. 224 (215), § 21. If the judges did not attend the first day, the sheriff or clerk adjourned the court until the next day, and if the judges did not then attend, it was the duty of the clerk or sheriff to adjourn the court without day. 2 R. S. 218 (209), §§ 8, 9.

b. Judgments. Records of judgments were signed and the costs taxed by one of the judges of the court. But in case the cause was one wherein the costs were not limited by law, it was necessary to have the record signed by a judge of the degree of counselor in the supreme court, and in case of the absence of the judges authorized to sign such a record, the clerk of the court might perform the duty. 2 R. S. 292 (282), § 35. There was a form prescribed in the statute for the records of judgments in the common pleas which is unnecessary to give in this place. See 2 R. S. 219 (210), § 15. The courts sustained the judgments of the common pleas, although the record did not show that the court obtained jurisdiction of the person of the defendant. *Hart v. Seixas*, 21 Wend. 40; *Foot v. Stevens*, 17 id. 483. Transcripts of justice's judgments might be filed and docketed in this court, when the recovery, exclusive of costs, exceeded \$25. 2 R. S. 264 (247), §§ 127, 128. And this court could not at one time inquire into the regularity or fairness of such judgments. *The People v. Judges of Washington Com. Pleas*, 1 Wend. 79. But the statute gave power to inquire into the consideration of the judgment, and in a proper case to set it aside. 2 R. S. 246, § 116. See *McCunn v. Barnett*, 2 E. D. Smith, 521. The judgments of this court were judgments of a court of record, and took effect as such. See 2 R. S. 371 (359), § 3.

Section 3. Courts under constitution of 1846.

a. Terms. By the amended judiciary article of 1847, the county courts were to be held at the usual place of holding courts of common pleas or circuits, as often and at such times as the county judge should appoint by order, which order was required to be published once a week, for three weeks successively, in a newspaper printed in the county. He might increase the number of terms, or dispense with any term, by an order entered two months before the change took effect, and published as above. But he was required to designate as many terms for the trial of issues of fact as there were then terms of the common pleas for that purpose fixed. 4 Stat. at Large, 585; Laws of 1847, ch. 470, §§ 24, 25, as amended.

By the Code, as amended in 1849, the county court was to be considered as always open, for the transaction of business, for which no notice was required to be given to the opposite party. At least two terms in each county were to be held for the trial of issues of law or fact, and as many more in each year as the

Removal of causes into or from.

county judge should appoint, at the places designated by law for holding courts, on the days appointed by the county judge, and to continue as long as the court might deem necessary. Provision was also made for the publication of the appointment at least four weeks before the terms were held, in the State and county papers, and the county judge might designate which of such terms were to be held for the trial of issues of law, and at such terms no jury was required to attend. Code, § 31.

b. Judgments. The judgments of the court are entered in the same manner, and are of the same effect, as judgments of the supreme court. See "Judgment."

Section 4. Present courts. The provisions of the Code as to terms and judgments are applicable to the present county courts, as pointed out in the preceding section. It may perhaps be well to notice in this place that county judges may hold terms of the court in any county of the State, except New York and Kings, when requested by the judge of such county. Const., art. 6, § 15. It is the duty of the supervisors of the several counties to furnish rooms, fuel, lights, attendants and stationery, suitable and sufficient for the transaction of the business of the court, and if they neglect so to do the court may direct the sheriff to supply them, and the expense will be a county charge. Code, § 28.

ARTICLE VI.

REMOVAL OF CAUSES INTO OR FROM.

Section 1. Early courts. Under the early practice in these courts actions might have been removed from the common pleas to the supreme court either by *certiorari* or by *habeas corpus* (See 2 Paine & Duer's Prac. 205); and we find in the act establishing these courts a provision that any action or suit might be removed from the common pleas to the supreme court, if the debt or damages laid in such action exceeded the sum of £20. Laws, Bradford's Ed. of 1694, 264. See 2 Paine and Duer's Prac. 720.

Section 2. Before 1846. Under the Revised Statutes all personal actions in which the debt or damages claimed, or the matter or thing in demand exceeded the sum of \$250, might be removed into the supreme court at the instance of the defendant, by a writ of *certiorari*; and the following actions might be removed in the same manner whatever the amount of the demand, viz.:

Under constitution of 1846 — Present courts.

1. Actions in which the people of the State were interested. 2. Actions by or against the corporation of any city. 3. Actions of ejectment, and all other actions in which the title to real estate shall come in question. 4. Actions of replevin, and for false imprisonment. 2 R. S. 404 (389), §§ 2, 4. But no matter brought into the common pleas by appeal could be removed until that court had made a final determination in the matter. *Id.* 406 (391), § 16.

Section 3. Under constitution of 1846.

a. Removal to. Any action pending in any mayor's or recorder's court, in which the judge is for any cause incapable of acting, may by such court be transferred to the county court of the county, and the papers on file therein should be transmitted to the county court. Code, § 33. Previous to the amendment of 1858, county courts had jurisdiction of causes dismissed by justice's courts on a plea of title. *Cook v. Nellis*, 18 N. Y. (4 Smith) 126; but see *Kundolf v. Thalheimer*, 12 N. Y. (2 Kern.) 593.

b. Removal from. When the county judge was for any cause incapable of acting in a case pending in the county court, it was his duty to make and file a certificate of that fact, and jurisdiction of the cause was thereupon vested in the supreme court. Laws of 1847, ch. 470, § 31; Code, § 30.

When the hearing of an appeal from a justice's judgment was removed by such proceedings, it was required to be heard in the first instance at special term, in the county where the cause was first tried. *Wiles v. Peck*, 16 How. 541; *Davis v. Stone*, *id.* 538; *Sheldon v. Albro*, 8 *id.* 305.

Any action brought under subdivision 1 of section 30 of the Code might be removed into the supreme court before trial, upon special motion for cause shown. Code, § 30.

Section 4. Present courts. Under the amended judiciary article of the constitution there has been no change in the practice relating to the removal of causes into and from the county court, except that the act which extends the jurisdiction of the county courts also provides that any action brought by virtue of its provisions may be removed by the supreme court into that court before trial, upon special motion, for good cause shown; and the supreme court may also change the venue of such action. Laws of 1870, ch. 467, § 1.

ARTICLE VII.

RULES AND CALENDARS.

Section 1. Early courts. When these courts were first organized, the justices and judges thereof were authorized to make, order and establish all such rules and orders, "for the more orderly practicing and proceeding in their courts," as the judges of the English courts were empowered to make. *Laws*, Bradford's ed. 1694, 264. See 2 Paine & Duer's Prac. 720.

Section 2. Court before 1846. The court, when re-organized under the Revised Statutes, was invested with the powers respecting its practice which it had formerly possessed previous to that time, which of course included the power to regulate the proceedings before it. See 2 R. S. 217 (208), § 1.

Section 3. Under constitution of 1846. The Code of Procedure provided that the judges of the supreme court, the superior court, and the court of common pleas of the city and county of New York, should meet once in two years, and make rules which should govern the practice of these courts, so far as applicable (Code, § 470), and all rules inconsistent with the Code were abrogated, subject to the right of the several courts to modify the same. Code, § 469.

Section 4. Present practice.

a. Rules. By an act passed in 1870 it is the duty of the general term judges of the supreme court, the chief judges of superior courts of cities, and the chief judge of the court of common pleas of the city and county of New York, to meet in convention at the city of Albany, once in two years, to revise, alter, abolish and make rules, which shall be binding upon all courts of record, so far as the same may be applicable. *Laws* of 1870, ch. 408, § 13. Other courts are at liberty to make rules for the transaction of their business respectively not inconsistent with such general rules. Supreme Court Rules, 91.

b. Calendars. The practice as to entering causes on the calendar, and the order of disposing of the issues thereon, is the same as that of the supreme court. Code, §§ 256, 257.

Appeals.

ARTICLE VIII.

APPEALS.

Section 1. Early courts. Provision was made in the act establishing the courts of common pleas, for appeals from any judgment obtained in that court, to the supreme court, provided such judgment was "above the value of £20," and from the supreme court to the governor and council for any judgment above the value of £100, and from the governor and council to their majesties' council for any decree or judgment above the value of £300. Laws, Bradford's ed. 1694, 264. See 2 Paine & Duer's Prac. 721.

Section 2. Before 1846.

a. Appeals to. Justice's judgments were, under the Revised Statutes, reviewable in the first instance by the common pleas of the county, and the judgments were removed for review either by *certiorari*, where the debt or damages recovered did not exceed \$25, exclusive of costs, or where an issue was not joined before the justice (2 R. S. 255, § 170); or by *appeal*, where the recovery exceeded \$25, exclusive of costs: 1. Where the judgment was rendered upon an issue of law joined between the parties. 2. Where it was rendered upon an issue of fact joined between the parties, whether the defendant was present at the trial or not. 2 R. S. 258, § 186.

The common pleas had also the power of review in certain special proceedings, as on appeal from the determination of commissioners of highways. 1 R. S. 477 (518), § 84; Laws of 1845, ch. 180. From decisions respecting lunatics. Laws of 1842, ch. 135.

b. Appeals from. For errors of law or fact a writ of error would lie from these courts to the supreme court. 1 Paine & Duer's Prac. 229. The writ was granted by a justice of the supreme court, or by a clerk of that court, or by an officer authorized to perform the duties of justice of the supreme court. 2 R. S. 617 (595), § 25. The court of common pleas could not grant a writ of error *coram nobis*. *People v. Oneida Common Pleas*, 20 Johns. 22. See *People v. New York Common Pleas*, 4 Wend. 215.

Under constitution of 1846.

Section 3. Under constitution of 1846.

a. In general. Until the adoption of the Code the practice respecting appeals to and from the county courts was the same as it had been previous to the constitution of 1846. See 4 Stat. at Large, 560, 565, §§ 17, 35.

b. Appeals from. When the Code was adopted a great change was effected in the mode of reviewing judgments and orders in civil actions. The old writ of *certiorari* was abolished, and the only mode of review was declared to be by appeal. Code, § 323.

Appeals were allowed to the general term of the supreme court from a judgment of the county court, or from an order made by a county court or a county judge affecting a substantial right in any action or proceeding. Code, § 344. And from thence to the court of appeals. Code, § 11. But, when the action was originally commenced in a justice's court, an appeal could not be taken to the court of appeals unless the general term of the supreme court made an order allowing such appeal before the end of the next term after the judgment was entered. Code, § 11; *Wait v. Van Allen*, 22 N. Y. (8 Smith) 319.

c. Appeals to. These courts have exclusive power to review, in the first instance, judgments rendered in civil actions by justices of the peace. Code, § 30.

In special proceedings they have the power of review in certain cases prescribed by statute, as, on appeal from the determination of commissioners of highways (1 R. S. 477 [518], § 84; Laws of 1845, ch. 180); and from summary proceedings before a justice of the peace to recover the possession of land. Laws of 1849, ch. 193.

Section 4. Present practice. Since the adoption of the amended article of the constitution in 1869, the practice on appeals to and from the county court in actions, and in special proceedings, remains as it existed under the constitution of 1846. See preceding section.

CHAPTER XV.

SURROGATES' COURTS.

ARTICLE I.

ORGANIZATION.

Section 1. The office of surrogate. The county judge is surrogate of his county, but in case the population of any county exceeds forty thousand, the legislature may provide for the election of a separate officer to be surrogate. Const., art. 6, § 15

Section 2. Vacancies, etc. In case of the inability of the surrogate to act, or in case of a vacancy, the legislature may, on application of the board of supervisors, provide for the election of an officer to discharge the duties of that office. Const., art. 6, § 16.

Section 3. Term of office. The term of office of surrogates elected after Dec. 6, 1869, is six years. Const., art. 6, § 15. Those in office at that time continue until the expiration of their term. Const., art. 6, § 25.

Section 4. Compensation. Surrogates receive a salary, established by law, and paid out of the county treasury. Const., art. 6, § 15.

No surrogate is allowed to receive fees for any official service, except for copies of records and papers; but this provision does not extend to the surrogate of the county of New York. 7 Stat. at Large, 433; Laws of 1869, ch. 246.

Section 5. Oath and bond. Every surrogate, before entering upon the duties of his office, must take the oath of office and file a bond, with two sureties, in the county clerk's office. 1 R. S. 109; id. 354.

Section 6. Surrogate a witness of wills. In any case where a surrogate would have exclusive jurisdiction to admit probate of any will, etc., if he is a subscribing witness to such will, the first judge of the county court in such surrogate's county may exercise the same authority in the matter as the surrogate might have done. 4 Stat. at Large, 486; Laws of 1834, ch. 308; 2 R. S. 80, 81.

Surrogate interested in estate — Jurisdiction.

Section 7. Surrogate interested in estate. The same provision is applicable if the surrogate is interested in the estate as next of kin, or as legatee or as devisee under the will. 2 R. S. 80, 81.

Section 8. Officer acting as surrogate. All laws relating to the powers and duties of surrogates shall be applicable to any officer while acting as surrogate, so far as the same may be applicable. 4 Stat. at Large, 566, § 37; Laws of 1847, ch. 280, art. 4, § 37.

Section 9. Court of record. Surrogates' courts are courts of record, and possess seals, a description of which is deposited and recorded in the office of the Secretary of State. 2 R. S. 230, §§ 3, 4.

Section 10. Surrogate not to act as attorney. Neither the surrogate, his partner, or any person connected with him in law business, shall act as attorney or counsel in his court, or in any proceeding originating therein. 4 Stat. at Large, 590, § 51.

Section 11. Power of courts of record as surrogates. For the relief of surrogates' courts, the legislature may confer upon courts of record, in any county having a population exceeding four hundred thousand, the powers and jurisdiction of surrogates, with authority to try issues of fact by jury in probate cases. Const., art. 6, § 27.

ARTICLE II.

JURISDICTION.

Section 1. Original. Every surrogate who shall have duly qualified shall hold a court which has jurisdiction of the following matters:

- I. To take proof of wills of real and personal estate.
- II. To grant letters testamentary, and of administration.
- III. To direct and control the conduct and settle the accounts of executors and administrators.
- IV. To enforce the payments of debts and legacies, and the distribution of the estates of intestates.
- V. To order the sale and disposition of the real estate of deceased persons.
- VI. To administer justice in all matters relating to the affairs of deceased persons, according to the provisions of the statutes of this State.

Jurisdiction — Powers of the court.

VII. To appoint guardians for minors, to remove them, to direct and control their conduct, and to settle their accounts as prescribed by law.

VIII. To cause the admeasurement of dower to widows.

But this jurisdiction can only be exercised in the cases and in the manner prescribed by law. 2 R. S. 220, § 1.

Section 2. Certain surrogates have exclusive jurisdiction. The surrogate of each county has exclusive jurisdiction within his county to take proof of lost wills and testaments in the following cases :

I. Where the testator, at or immediately previous to his death, was an inhabitant of the county of such surrogate, in whatever county he may have died.

II. Where the testator, not being an inhabitant of the State, shall die in the county of such surrogate, leaving assets therein.

III. Where the testator, not being an inhabitant of this State, shall die out of the State, leaving assets in the county of such surrogate.

IV. Where a testator, not being an inhabitant of this State, shall die out of the State, not leaving assets therein, but assets of such testator shall thereafter come into the county of such surrogate.

V. Where no surrogate has gained jurisdiction under the above provisions, and any real estate devised by the testator shall be situated in the county of such surrogate. 4 Stat. at Large, 486 ; Laws of 1837, ch. 460, § 1.

ARTICLE III.

POWERS OF THE COURT.

Section 1. Powers of surrogate.

a. In general. The jurisdiction of the surrogate's court and the powers of the surrogate are so intimately connected with each other that it is with difficulty that any classification can be made, but to preserve the unity of our plan we have given under the head of "jurisdiction" the matters of which the surrogate may take cognizance, while in the present chapter we shall notice briefly the general powers conferred by statute upon the surrogate in relation to the matters noticed above. For an enumeration of the powers conferred upon the surrogate, which are

Powers of the court.

incidental to the transaction of business before him, see the general practice of this court in a subsequent part of this work.

b. Subpœnas. Every surrogate has power to issue subpœnas to witnesses in any part of the State, to compel their attendance and the production of papers.

c. Attachment against witnesses. To punish witnesses for non-attendance, or for refusing to testify, in the same manner, and to the same extent, as courts of record in similar cases.

d. Citations. To issue citations to compel the appearance of parties in matters pending in the court.

e. Enforcing orders, etc. He has power to enforce the execution of the process of his court, and may compel compliance with his orders and decrees by attachment.

f. Exemplification of records. He may, under his seal of office, exemplify all records, papers and proceedings in his court, which are then receivable in evidence in all courts.

g. Contempt. He may punish contempts in the same manner, and to the same extent, as courts of record. 2 R. S. 220, § 6. And as to subpœnas in certain cases. Id. 58, § 10.

h. Invalid will. He may revoke the probate of wills in proper cases. 2 R. S. 62, § 35.

i. Requiring account. The surrogate may require an executor, administrator or guardian to render an account of his proceedings, by an order to that effect, and obedience to such order may be enforced by mandamus and attachment. 2 R. S. 93, § 58. He may compel an account by testamentary trustees and guardians in the same manner. 7 Stat. at Large, 167; Laws of 1867, ch. 782, § 1; *Seaman v. Duryea*, 11 N. Y. (1 Kern.) 324.

j. May refuse letters to the ignorant. Every surrogate has discretion to refuse letters testamentary, or of administration, to any person unable to read and write the English language. 7 Stat. at Large, 168; Laws of 1867, ch. 782, § 5.

k. Commitment for perjury. If any person legally sworn and examined before a surrogate testify in such a manner as to induce a reasonable presumption that he has willfully testified falsely as to some material point, such surrogate may commit him to prison, or take a recognizance with sureties for his appearance to answer to an indictment for perjury. 7 Stat. at Large, 170; Laws of 1867, ch. 782, § 15.

l. Surplus moneys. The surrogate has authority to receive, and by order dispose of surplus moneys arising from the sale of

Officers.

land, etc., by virtue of any mortgage or other lien against the estate of deceased persons. 7 Stat. at Large, 142; Laws of 1867, ch. 658; Laws of 1870, ch. 170; 7 Stat. at Large, 664.

m. Appointment of clerk. The surrogate may, by an order filed and recorded in his office, appoint a clerk who may certify copies of records in the office, and sign, as clerk, citations, writs, etc., and administer oaths; and the surrogate may, by a like order, revoke such designation, and appoint some other clerk. 6 Stat. at Large, 127, § 9; Laws of 1863, ch. 362, § 9.

ARTICLE IV.

OFFICERS.

Section 1. Clerk.

a. Appointment. The surrogate may, by an order in writing, to be filed and recorded in his office, designate any clerk employed therein to be clerk of the court. And the surrogate may, in like manner, revoke such designation, and appoint some other clerk. 6 Stat. at Large, 127, § 9; Laws of 1863, ch. 362, § 9.

b. Powers. A clerk so appointed may certify, under the seal of the court, copies of documents required to be recorded in the surrogate's office, and may sign, as clerk of the court, all writs and process required to be issued therefrom, and may administer oaths and certify the same for use in that court; papers so certified, and under the seal of the court, may be received in evidence. *Ib.*

Section 2. Stenographer.

a. Appointment; salary. The surrogate of the county of New York is authorized and directed to appoint a stenographer to his court, who shall be a sworn officer of that court, and who shall receive a salary of \$3,000, to be paid from the fees of that court, paid into the treasury of the county of New York. Code, § 256; Laws of 1871, ch. 874.

b. Term of office. He holds his position during good behavior, and so long as he shall efficiently discharge the duties of his office. Code, § 256; Laws of 1871, ch. 874.

c. Duties. He shall take full stenographic notes, under the direction of the surrogate, of all proceedings had in the court, in which oral proofs are given, and after being fully transcribed and signed by the witnesses, shall be filed in the surrogate's office. By the consent of the parties to the proceeding, and of

Terms—Removal of causes.

the surrogate, the signing by the witnesses may be waived, or in case the witness dies before the records are transcribed, the record of proof under the certificate of the stenographer or surrogate shall be deemed the record of the proofs and proceedings so taken. Code, § 256.

ARTICLE V.

TERMS.

Section 1. Always open. The surrogates' courts are always open for the hearing of any matters within their jurisdiction, and particularly on Monday of each week, it is the duty of the surrogate to attend at his office to execute the powers and duties conferred upon him. 2 R. S. 221, § 2; 4 Stat. at Large, 565, § 33; Laws of 1847, ch. 280, art. 4, § 32. By the act of 1847 it is provided that, in counties where the county judge performs the duties of the office of surrogate, the court may be held at the time and place at which county courts are held, and the order of business shall be under the direction of the county judge, who shall perform the duties of the office of surrogate at such other times and places as the public interest may require. 4 Stat. at Large, 565, § 32; Laws of 1847, ch. 280, art. 4, § 32.

It is also provided by the same act that if any court appointed to be held shall fail, no writ, process, or other proceeding shall be abated, discontinued or rendered void thereby. Id., § 28.

Section 2. Rooms, etc. The board of supervisors of each county must provide the court with rooms, fuel, lights and stationery, suitable and sufficient for the transaction of its business, and if they fail, the court may, by order duly entered, direct the sheriff of the county to supply the necessary accommodations, and his expenses in so doing become a county charge. 7 Stat. at Large, 169, § 10; Laws of 1867, ch. 782, § 10.

ARTICLE VI.

REMOVAL OF CAUSES.

Section 1. In what cases. The only case in which causes are removed from this court is when the legislature has conferred upon courts of record, in counties where the population exceeds

Rules — Appeals.

four hundred thousand, the powers and jurisdiction of surrogates, with authority to try issues of fact by jury in probate causes. See article 1 of this chapter, § 11, *ante*, 405.

ARTICLE VII.

RULES.

Section 1. Supreme court rules. The general rules of the supreme court are binding upon this court, so far as they are applicable to it. Laws of 1870, ch. 408, § 13.

ARTICLE VIII.

APPEALS.

Section 1. To the supreme court. Appeals from the decision of the surrogate were formerly taken to the circuit judge, and to the court of chancery in certain cases, but under the present judicial system appeals are taken to the supreme court, which possesses all the powers in such cases formerly vested in the circuit judge, and in the courts of chancery. Laws of 1847, ch. 280, § 17; *Whitbeck v. Patterson*, 22 Barb. 83.

Appeals from the decisions of surrogates are not affected by the second part of the Code. Code, § 471.

PART III.

PRACTICE CONSIDERED GENERALLY.

CHAPTER I.

GENERAL NATURE OF PRACTICE.

ARTICLE I.

ELEMENTARY AND HISTORICAL SKETCH.

Section 1. Definition. Practice has been defined to be the course of procedure in the courts; the form and manner of conducting or carrying on, in the way of either prosecution or defense, of suits, actions and other judicial proceedings, at law or in equity, civil or criminal, through their various stages, according to the principles and regulations prescribed by law, or by the rules and decisions of the several courts. Burr. Dict. See also Bouv. Dict.

The present work is limited to an exposition of the principles and the details of the practice in civil actions, whether legal or equitable in their nature, in the superior courts of record in this State. To explain the subject properly requires more than a mere statement of the present system of practice. A careful study of the former systems of practice at law, and in equity, is invaluable as an aid in comprehending some of the technical rules of practice which are now daily applied by the courts. He who is familiar with the former practice in equity can readily see what cases are to be pursued according to the equity practice, even under our present system of law and equity united.

And so, too, one who knows the details of the common-law practice will readily and easily apply its rules to actions in the courts as now organized, whenever those rules are such as to be still in force.

Importance of a knowledge of practice.

The plan of this work, although extensive enough to include the entire practice in legal and in equitable actions, as well as in special proceedings, does not permit a full statement of the former practice at law and in equity ; and, for such information, resort must be had to the works on practice under the former systems. A brief outline, however, will be valuable as a mode of showing some of the more striking features of the two systems of practice, and, from this contrast, the student will the more readily determine the nature or the character of the practice which ought to be adopted in any particular case under consideration. Such a knowledge will frequently be valuable by suggesting the proper source of information needed ; for, if the action is one of a legal character, he will consult the works on common-law practice, while in equitable actions a resort to equity practice will be necessary. To aid the student, and the young practitioner, much care has been taken to point out many of the strongly distinguishing features of legal and equitable actions and jurisdictions, as well as the peculiar modes of practice by which such remedies were formerly administered by the several courts. If this part of the work is not as full as the student may sometimes desire, it is much more complete in that respect than other works on practice, and will, at least, serve to point out the direction in which to search for information.

Section 2. Importance of a knowledge of practice. Every one recognizes the fact that a good lawyer is familiar with legal rules, and with equitable principles ; and that, while acquiring that knowledge, he must necessarily become more or less familiar with the rules of practice. In the ordinary course of studies pursued by the beginner, he is presented with some works which are mainly devoted to an exposition of the rules of law, or of the principles of equity ; while others are devoted to an explanation of the mode of proceeding in the courts in the course of applying such rules of law.

A thorough and accomplished practitioner will make himself familiar with the principles of the law, whether legal or equitable, as well as with the rules of practice applied by the courts. In the commencement of the practice of every young lawyer, he will naturally consult some experienced member of the profession in all important and intricate cases ; and this is especially true in relation to the right of action or the grounds of defense. In such cases, the most learned counselor may sometimes be at

Simplicity of the early practice.

a loss as to the true rule of law ; while the points of practice involved, may be matters of every day occurrence with him. It is evident, therefore, that there are many cases in which assistance is indispensable to the practitioner in his first efforts, but, in relation to the general practice of the courts, there is seldom any such necessity for his resort to the assistance of others. He ought to make himself as thoroughly conversant with the general principles of the law as his circumstances will permit ; but, if with a good degree of such knowledge, he is still ignorant of the mode of applying to the courts for their assistance, in the ordinary proceedings in the course of an action, his want of this information will result in a loss of time, money, and, perhaps, of the interests of his clients ; while it will seriously prejudice him in public estimation, and especially in the confidence of the bar and of the bench, in regard to his legal attainments.

It is mainly due to a want of knowledge of the practice, that so many good causes are lost, or the remedy so long deferred, or so many valid defenses sacrificed, or rendered but partially available. He who knows the law of his cases, who is skilled in the practice, and is industrious in his habits as well as energetic by nature, will seldom be delayed in securing all needed remedies for his clients, and will seldom have cause to complain of the law's delays. Thus much has been said for the purpose of persuading the younger members of the profession to become reliable practitioners, as they will then render an efficient service to their clients, secure the confidence of the bar and of the bench, as well as of the public, from whom they expect to derive all the pecuniary advantages of the profession.

Section 3. Simplicity of the early practice. As this is not a historical work, it will not be expected that an account will be given of the details of the early practice. One general principle, however, will be readily conceded, and that is, that when the laws were few and plain, and the courts were adapted to such a state of society, the practice must have corresponded with the courts and the times, and, of necessity, been simple and convenient in its application.

The English practice, from which we have so largely borrowed, was, in its origin, of this simple character. It is true that, in the course of time, technicalities were introduced, and that ultimately there were many difficulties in the way of the practitioner. But, as difficulties arose, they were met and surmounted, even

Adapted to the particular courts where used.

after many long delays and inconveniences had resulted from them. And, from that early day to the present time, the course of the practice has been constantly changing in some of its features, and yet, in the main principles, unchanged and unchangeable. In this continued change there have been many things introduced as novelties, which, to the student who is familiar with the history of the practice, will be seen to be nothing more than an old acquaintance, who was out of fashion for a time, but who has now been restored to his former position and influence.

In the course of this chapter a few instances will be introduced for the purpose of showing the character of the early practice, as to the mode of commencing actions, of pleading, of trials, judgments, and of the correction of errors.

Section 4. Adapted to the particular courts where used. During all past time courts have been divided into inferior and superior courts, as to jurisdiction over subject-matter, or as to persons, and as to courts for the trial of causes, and courts of review. And, in all such cases, the practice must necessarily have been such as was appropriate to the particular court which adopted it. An enumeration of these courts, with a detail of the practice of each, would be interesting and instructive, but would be out of place here, except so far as some general statements may serve as illustrations of the condition of society, and of the practice of the courts in times long gone by. But before proceeding with that subject, it may be remarked that the principle that the practice is adapted to the court, may now be seen in every court in existence. The practice of the highest appellate court differs widely in its details from that of a trial court, which does nothing but try and dispose of the issues of law or fact, in the various causes tried. So, too, the details of the practice in an inferior court are widely different from those of a court of record, while the object and the general features are, and must always remain, essentially the same; as, for instance, there must be a mode of commencing actions, of framing issues, and of trying them, and of rendering and enforcing judgments. In such prominent points we see landmarks that characterize courts, and the administration of legal and equitable remedies; and the only material difference that can exist in the practice is the adoption of such a plan as shall be best calculated to secure the object of a court, while, in the details of the practice of each court, there

Early mode of commencing actions.

will be that difference which the nature of the court, its jurisdiction, or its peculiarities may require.

Section 5. Early mode of commencing actions. In tracing our system of practice to its source, we necessarily investigate the English practice, with which ours is so closely connected, and from which so many rules and principles have been derived. In this country there was an early practice as contradistinguished from the practice of the present day. For information of this character, an examination of the introduction to the first volume of E. D. Smith's reports will be of great service to the student.

The fundamental principle, that every person is entitled to notice of legal proceedings taken against his person or his property, is very seldom entirely disregarded. But the character of the process, or the mode of its service, will vary materially according to the character of the court or the nature of the action.

In reference to the modes of proceeding in the courts of the Anglo-Saxons, we are informed that no writ or precept from the king was required to give the court jurisdiction. The party commenced his suit as and when he pleased; he himself, without the interference of any magistrate, summoned his adversary to appear and answer the claim to be advanced against him. He stated his ground of complaint in his own way, without being tied to forms. 1 Spence's Eq. Jur. 62. Where the mode of proof was not provided for by law, and the truth was unknown to the assembled judges, or incapable of direct proof, the parties were put to their oaths, and the corroborating oaths to their credit of co-jurors. *Ib.* The value of the oath of the co-juror was estimated by his rank. This system of procedure in civil cases prevailed down to the conquest, and for some time afterward. *Ib.* At the present time the process by summons, and the right to swear parties, has been regarded by some persons as a new feature in the practice, and yet it was familiar practice centuries ago in the earliest stages of English society. At that early day writs were rarely used in legal proceedings, the parties being mostly summoned by some officer or messenger in person. Thus, in the latter example, the king sent his seal and a message to the court. Crabb's Hist. Eng. Law, 32.

At a later period the rule was changed, and no action could be commenced in the king's courts without a writ, which was in the form of a precept or mandate from the king, under the great seal, addressed to the sheriff of the county in which the cause of

Early mode of pleading — Early modes of trial.

action arose, commanding him to cause the party complained of to appear in the king's court at a certain day, to answer the complaint. 1 Spence's Eq. Jur. 226 ; Crabb's Hist. Eng. Law, 109 to 112. Arrests for debt were permitted at this early day. Crabb, 268.

In equity, a suit was commenced by the filing of a bill, upon which a subpoena issued for the purpose of securing the appearance of the defendant in court. 1 Spence's Eq. Jur. 368, 369.

Section 6. Early mode of pleading. The appearance of the defendant having been accomplished, the next step in the ordinary course of proceedings was the presentation of the cause of action or the grounds of defense. This is an essential proceeding in every action, under every system of administering remedies, for it is the only mode of informing the court of the nature of the claims made by the respective litigants. Anciently, in actions at law, the plaintiff was permitted to state his ground of complaint in his own way, without being tied to forms. 1 Spence's Eq. Jur. 62. By the old practice the declaration or count might be made orally ; but, according to the later practice, it was delivered in writing. Id. 228, 231, 232.

The defendant might interpose dilatory pleas, since he might object to the jurisdiction of the court ; to the person of the plaintiff, as that he had not capacity to sue ; to the declaration, that it did not follow the writ, or to the writ itself. These pleas did not relate to the cause of action, which was met by a peremptory plea, or plea in bar. Id. 229. Subsequent pleadings, such as replication, rejoinder, and the like, were permitted. Ib. And the great object then, as now, was the joining of an issue of law or of fact, which was subsequently to be tried for the purpose of ascertaining the rights of the respective parties. The system of oral pleading practiced in the higher English courts at an early period may be daily seen in actual practice in most of the inferior courts of this country, at the present day.

Section 7. Early modes of trial. There is nothing connected with legal proceedings which presents a stronger contrast than the practice relating to the trial of actions for the enforcement of rights or the redress of wrongs. A trial and an adjudication is always essential, but the modes may differ most materially. And in times past there were some kinds of trial which were of a rude and unsatisfactory nature, but they have long been obsolete. The trials in criminal cases are described in various works.

See 4 Bla. Com. 342 to 350. The trials in civil actions were of several different kinds, and were quite numerous. See 3 Bla. Com. 330 to 350; Crabb's Hist. Eng. Law, 27, 33, 47, 115 to 124. As we read of these barbarous and unreasonable modes of ascertaining the rights of parties, or their guilt or innocence, we are struck by the great improvements which have been made, and by the wisdom and justice which pervade our present systems of trials. The superstitions and the ignorance of the people will be better comprehended when it is stated that at that time there was scarcely a person competent to act as an advocate of causes unless he was found among the clergy, and it has been said that "The priests and monks alone were competent to undertake as advocates a legal discussion." 1 Spence's Eq. Jur. 14. And these persons for a long period acted as advocates before the legal tribunals, from which practice they derived considerable emoluments. *Ib.* After the Norman conquest, the mode of trial by jury became the usual and favorite one. For a history of jury trials, see 1 Spence's Eq. Jur. 112, 113, 128, note.

Section 8. Records of trials. Formerly the county courts and the courts of the hundred were the ordinary courts of original jurisdiction for the trial of all questions not affecting the king or the nobles of the land; these courts were open to all, and the suitor brought forward his complaint as he pleased, without regard to form. But, after the foundations of the common law, and the judicial system, had become securely and permanently fixed, the king's courts, held by his justices, were the ordinary courts for the trial of all questions of importance. 1 Spence's Eq. Jur. 127. Under the new system the king was the fountain of justice, and it was necessary to procure the king's writ in order to secure justice in his courts and their several branches; and the suit must be prosecuted according to the established forms of these courts. *Ib.* In ancient times, even under the Anglo-Normans, no authentic record was kept of the proceedings of the ordinary tribunals; and the proceedings in the county court might be the subject of controversy, even by the parties themselves. *Ib.* But the proceedings in the later courts were recorded and the record could not be disputed; and these records formed a series of precedents for future decisions, a thing unknown to the ancient judicial constitution; and besides, appeals by writ of error from the inferior to the superior court were introduced. *Ib.* In the earlier courts, there were no records of the decis-

Records of trials — Review and correction of errors.

ions of any court which could serve as precedents. The decisions of one tribunal were not binding on another, nor, indeed, so far as can be learned, was any court bound by its own decision, if from caprice, or any other cause, the opinions of its members should take a different turn. 1 Spence's Eq. Jur. 282. There is no notice of any authentic records having been kept, even of the proceedings which took place in the king's court, either originally or by way of appeal from the inferior jurisdictions; though, no doubt, appeals brought before the king's court occasioned the enactment of many of the laws contained in the Codes, if those laws were not, in fact, in many instances the very decisions themselves. Ib. From this rude and imperfect method of making up and preserving the records of the courts, there have been constant changes and improvements, until it is a part of the regular practice to prepare an accurate, complete and authentic record of all the proceedings in an action from its commencement to its final termination; and the record when thus made up imports absolute verity, and concludes all the parties to the action, unless set aside by some of the regularly authorized proceedings allowed by law for that purpose.

Section 9. Review and correction of errors. By the common law, at a quite early period, a writ of error might have been obtained whenever there was error in the record; but when the justices overruled an exception, it was never entered upon the record, and, therefore, no writ of error could be had.

To remedy this defect, and as a necessary check on the judges at that time, a statute was enacted which took away from the judges the discretionary power of refusing exceptions when offered, and it required the judges to sign and seal a bill of exceptions when properly required to do so, and upon these exceptions a review might be had on a writ of error. Crabb's Hist. Eng. Law, 184, 185.

By subsequent changes in the law every facility has been afforded for a full and fair review of all the decisions of the courts of original jurisdiction, and even of all the appellate courts lower than the court of last resort, until the right of review is as firmly established and as well guarded as any of the other remedies provided by law. Having thus briefly shown some of the features of the practice in its earlier condition, we are now prepared for a short sketch of the distinctive features of the common law and of the equity practice, before entering upon the details of the practice now in use in this State.

CHAPTER II.

PRACTICE AT LAW PRIOR TO 1846.

ARTICLE I.

THE COURTS AND THEIR ORGANIZATION.

Section 1. In general. In this chapter an attempt will be made to point out some of the more prominent and distinguishing features of the common-law practice, which was in force in this State at the time of the adoption of the constitution of 1846. To give the details of that practice at any great length would be useless, as the older works on practice will furnish that information. But, to give a brief synopsis of the principal steps in an action at law, as well as those in a suit in equity, it is believed will better enable the student to understand the present practice, as the contrasts thus presented will fix his attention upon many matters which might otherwise fail to receive due consideration.

Section 2. The supreme court. Under the former system, the powers of this court were exercised by the chief justice and two associate justices, and any of them might hold the court. The original jurisdiction of the court was the same as that which had always been exercised by that court from the organization of the State, or even during colonial times.

It had general appellate jurisdiction for the review and correction of all errors that might occur in inferior courts.

Section 3. Terms of the court. The terms were either general or special. The general terms were four in number, the January term was held at Albany; the May term in New York; the July term in Utica; and the October term in Rochester. These terms were deemed to continue for four weeks for some purposes, and for but two weeks for other proceedings.

The special terms were held in February, April, June, September and December, and they continued until the business was disposed of. These terms were held by one of the justices of the supreme court.

Section 4. Circuit courts. The State was divided into eight circuits, and a circuit judge was appointed for each circuit. The circuit judges usually presided over these courts, of which there

The kinds of action.

were at least two terms in each county every year. The court might be held by any one of the justices of the supreme court, or by any circuit judge.

The terms continued as long as the judge deemed necessary for the public interests. These courts might be adjourned from time to time as the court might direct. These circuit judges each possessed the powers of a justice of the supreme court at chambers, and in the trial of issues joined in the supreme court, and in courts of oyer and terminer. Every circuit judge was required to hold a court once at least every three months, for hearing arguments of the matters committed to his decision. From the decisions made by the special terms, or those made by the circuit judges, an appeal might be taken to the supreme court.

Section 5. Common pleas. In each of the counties of this State there was a court of common pleas. The general jurisdiction of this court has been noticed when discussing the jurisdiction of the county courts.

Section 6. New York superior court. This court has been sufficiently noticed in explaining its jurisdiction and powers.

ARTICLE II.

THE KINDS OF ACTION.

Section 1. In general. Under the former practice there were numerous varieties of common-law actions, each of which had a name, and was designed for a particular purpose. To define them is not now intended, but a brief enumeration of most of them will serve to show what jurisdiction was exercised by the former supreme court in actions at law.

Section 2. Real actions. There were numerous actions relating to real estate, and among them Ejectment, in ordinary cases ; For the recovery of dower ; For non-payment of rent ; For terminating a tenancy, and the like ; Actions for Partition ; of Nuisance ; of Waste ; For Trespass on lands ; For the determination of claims to land, and for the Admeasurement of dower. The subject-matter of these actions will be quite fully discussed in a subsequent part of this work.

Section 3. Personal actions, ex contractu. These actions were, Account, Assumpsit, Covenant, and Debt, and their nature and object are sufficiently understood by every lawyer or student.

The parties to actions — Of the form of the action.

Section 4. Personal actions, ex delicto. These actions were Replevin, Trespass, Trespass on the case, Trover, Libel, Slander, and Malicious prosecution. Some of these actions will receive due attention elsewhere in this work.

ARTICLE III.

THE PARTIES TO ACTIONS.

Section 1. In general. This subject is too extensive to be discussed in this place, and information will be found in the former works on practice. There are one or two rules which ought, however, to be mentioned, as they differ essentially from the present practice. Under the old practice in actions *ex contractu*, the rule was that the actions must have been brought in the name of the party in whom was vested the *legal interest* in the contract, although the *equitable* title, or the real interest, was in another person. 1 Chit. Pl. 2-6; 1 Burr. Pr. (2d ed.) 60. Another rule was that the assignee of a personal contract could not sue upon it in his own name, but must bring his action in the name of the assignor. 1 Burr. Pr. 60. Negotiable paper, and some other instruments, formed exceptions to the general rule.

In actions *ex delicto*, the general rule was that the action must be brought in the name of the party whose legal right had been affected, and who was legally interested in the property, at the time the injury was committed. In those cases in which an assignment of the right of action was permitted, the assignee must have sued in the assignor's name. Though the rule was otherwise where the assignment was by operation of law, as in cases of insolvency.

The rule as to defendants under the old practice does not seem to demand notice here.

ARTICLE IV.

OF THE FORM OF THE ACTION.

Section 1. In general. Under the former system the form of action to be adopted was one of the first, and frequently one of the most important and intricate, questions which the practitioner had to consider.

Election of actions.

The boundaries which separated one form of action from another sometimes approached so near that great accuracy was necessary to guard against confounding one form of action with another, and thus making a wrong selection of a remedy, the consequences of which were sometimes quite material. If a party failed in his action, in consequence of a mistake in the form, and not upon the merits, he might commence a new action, and the first judgment would not bar a new suit. The delay and the costs, however, were to be borne by the defeated party.

Section 2. Election of actions. A plaintiff frequently had an election as to the form of action, as concurrent remedies for the same right of action, and various considerations were to be weighed before arriving at a conclusion. Among other things which the plaintiff took into account were the following :

1. *The plaintiff's interest.* If the plaintiff had an election between trespass or trover, for the wrongful conversion or detention of goods, and assumpsit for their value, the advantage of the former remedies would be that a bare possession by the plaintiff would, in general, sustain them, while in assumpsit a stricter right to the property might be required. So as between trespass and replevin, the latter was not adopted if there were a doubt as to the right of property.

2. *As to bail.* Where the plaintiff had a choice between an action in form *ex contractu*, and another *ex delicto*, the advantage of the latter consisted in the right of arrest, and to demand bail, which might not be allowed in the other form of action.

3. *As to the number of parties.* Where there was a doubt as to the number of parties to be joined as plaintiffs, and especially so as to defendants, the preferable action was in form *ex delicto*, as the mistake would be of less consequence than in an action in form *ex contractu*.

4. *As to joinder of demands in suit.* The practice to be observed in this respect was to adopt that form of action which would include all the plaintiff's demands when this was practicable.

5. *As to the defense.* In all cases the plaintiff adopted such form of action as would abridge the defense as much as possible.

6. *As to the venue.* Where there was a choice of actions, and one of them was in its nature local, and the other transitory, the latter was in some cases preferred.

Of the joinder of actions — Of the modes of commencing actions.

7. *As to the evidence.* There was a considerable difference between the various forms of action as to the nature or quantity of evidence to be adduced in their support, which was a matter carefully considered.

8. *As to the costs.* This subject was as important as any of the others, in many instances.

9. *As to the judgment.* This matter needs little explanation, except to remark that the judgment in some forms of action was more advantageous than that in a different form of action.

Section 3. Of the joinder of actions. If the plaintiff had several causes of action which might have been joined in one action, he ought to join them, for, in case of an omission or refusal to do so, the court might consolidate the actions at his expense for the application. In those cases in which the cause of action arose out of one contract, or rested in an account, the plaintiff must have joined them; and, if he split up causes of action by bringing a suit for a part, he would not be permitted to bring another action for the balance.

The former general rule was, that where the causes of action were all of the same nature, and the actions in the same form, they might be joined in the same suit. The causes of action ought, however, to all exist in the same right, for a demand by a party as executor could not have been joined with one in his own right.

ARTICLE V.

OF THE MODES OF COMMENCING ACTIONS.

Section 1. In general. There were three modes of commencing actions under the former practice, which were as follows:

1. By *summons*, against corporations.
2. By *capias ad respondendum*, against persons not privileged from arrest; and,
3. By *declaration*.

Section 2. Actions by or against corporations. Actions by corporations might have been commenced in the same way as actions by ordinary persons, that is, by *summons*, *capias*, or *declaration*. But actions against corporations, created by or under the laws of this State, must, in all cases, have been commenced by a *summons*, unless, in some particular case, the law provided some other process.

The *capias ad respondendum*.

The term "summons" was only another name for an original writ, for its form was, with some modifications, the same as that of the original writ, by which all actions were originally required to be commenced.

Section 3. The *capias ad respondendum*. The proceeding by *capias ad respondendum*, as a mode of commencing an action, was borrowed from the English practice. The writ, in an action in which bail might be required, was a judicial writ, running in the name of the people, and sealed with the seal of the court out of which it issued; was directed to the sheriff of the county in which the defendant was to be found (or, in some cases, to a coroner), commanding him to *take (capias)* the defendant, if he should be found in his county, and keep him safely, so that he might have his body before the justices of the court, at whatever place the court might sit, on a day specified (called the return day), to *answer (ad respondendum)* unto the plaintiff, of a plea of trespass. *And also (ac etiam)* to a bill of the said plaintiff against the said defendant, for (whatever the real cause of action might be), according to the custom of the court, before the justices thereof, then and there to be exhibited, and that he have the writ in court on the return day. It was then witnessed, or *tested*, in the name of the chief justice, or, if there were no chief justice, in the name of any justice of the court, and was lastly subscribed with the names of the clerks of the court, and of the plaintiff's attorney. The mode of making out the writ, and of issuing it, and the various incidents connected therewith, will not be detailed here. The writ was executed agreeably to its command, by the arrest of the defendant, and detaining him until discharged according to law, which was usually done by the execution of a bail bond for that purpose. The mode of returning the writ, and the subsequent proceedings before appearance, or on appearing, need no notice in this place.

If the action was one in which the defendant could not be arrested, the plaintiff proceeded by a *non bailable capias*, which resembled the bailable *capias* in all respects, except that the cause of action was not required to be specified; the defendant being merely required to answer the plaintiff "*of a plea of trespass.*" This process was executed by merely showing it to the defendant, and serving it on him personally, who usually indorsed his appearance on the writ. If he refused to do this,

Commencing suits by declaration — The pleadings.

the sheriff might return the writ "*personally served*," when the clerk would enter an appearance for the defendant.

When the defendant had thus appeared in the action, or an appearance had been duly entered by the clerk, the action was commenced, and the defendant before the court.

It will be observed that the *capias* was executed by the sheriff or one of his deputies, or by a coroner, or an elisor when the sheriff was incapacitated. The sheriff might also depute any person selected by the plaintiff or his attorney, but private persons could not serve process as is permitted under the present practice, except in the case of commencing a suit by declaration, and then any person might serve the copy, as is now done in the service of a copy of summons and complaint.

Section 4. Commencing suits by declaration. All personal actions, except replevin, might have been commenced by declaration. The mode of commencing an action in this way was to draw a declaration in the same manner as though intended to be filed with a *capias*. It was then filed in the office of one of the clerks of the supreme court, and a copy of it, indorsed with a notice to plead according to the practice of the court, was served upon the defendant personally. When the declaration had been duly filed and served and returned, the action was commenced, and the defendant was considered as in court.

When an action had been duly instituted in either of the modes specified, the parties were ready for the various steps in the pleadings, and that matter will form the subject of the next article.

ARTICLE VI.

THE PLEADINGS.

Section 1. In general. The forms of common-law pleadings under the old system differed quite widely from the system introduced by the Code of Procedure, which allows no pleadings but a complaint, answer, reply or demurrer. The old system permitted the plaintiff a declaration, replication, surrejoinder and a surrebutter; while either party might interpose a demurrer to his opponent's pleading.

The object of pleading under that system was to narrow the controversy to some direct issue on a particular point or matter of fact, or an issue of law raised by a demurrer to some pleading.

Of the trial.

Under the Code there is no pleading subsequent to the reply, and any new matter of fact will be deemed to be in issue for all the purposes of a trial. Code, § 168.

One of the peculiarities of the former system of pleadings was the plea of the "general issue," which not only put in issue the truth of the facts alleged in the declaration, but also permitted numerous other defenses of an affirmative character, such as payment, or its equivalent, performance of the contract, accord and satisfaction, arbitrament and award, a release, a former recovery, and numerous other similar defenses. Under the Code, new matter by way of avoidance of the cause of action, must be set up in the answer to be available as a defense.

The original theory of pleading is that the several pleadings are delivered orally, in term time, in open court, although in fact the process is conducted by filing written pleadings with the clerk of the proper court, and by serving a copy upon the adverse party, or his attorney. Where an issue had been produced, the cause was ready for trial, either as an issue of law or of fact.

ARTICLE VII.

OF THE TRIAL.

Section 1. The trial of issues of law. The trial of issues of law arising upon a demurrer was had on an argument before the justices of the supreme court, at a general term of the court. In giving judgment the court considered the whole record and rendered judgment against the party who committed the first error in substance in pleading: as, for instance, on a demurrer to a replication, if that pleading were bad, but the plea was also bad, then judgment was given for the plaintiff, unless his declaration was also bad, in which case judgment would be given for the defendant. This rule did not apply to cases of demurrer to a plea in abatement, nor where the first error was one merely of form. Pleadings held to be defective were allowed to be amended on the payment of costs. If a demurrer was overruled it might generally be withdrawn on payment of costs, though the statute limited this right in some cases.

Section 2. The trial of issues of fact. Where the trial of the cause would require the examination of a long account, on either side, a reference might be ordered. So in some cases of intricacy

Judgments.

or importance, a special jury might be had, on special leave given by the court. In certain cases a jury was summoned from another county, and it was termed a foreign jury.

The general practice, however, was to try the issues of fact, at the circuit court, before a jury, which did not differ from the present mode in any important particulars, unless it was in relation to the rule which required the plaintiff to notice the cause, and to bring it to trial, and in default of so doing, the defendant might move for judgment as in case of nonsuit, on account of such omission. The statute made it the duty of the plaintiff to bring the issues of fact to trial, and if he neglected this, judgment might be given for the defendant, as in cases of nonsuit. 2 R. S. 423, § 82. The statute did not extend to replevin, feigned issues, or errors in fact, for the defendant might bring those on for trial.

ARTICLE VIII.

JUDGMENTS.

Section 1. In general. A judgment is said to be the sentence of the law, pronounced by the court upon the matters contained in the record. 3 Bla. Com. 395. Judgments were of three kinds: 1. Where the *facts* were confessed by the parties, and the *law* determined by the court, as in case of judgment on demurrer. 2. Where the *law* was admitted by the parties, and the *facts* disputed, as in case of a judgment on verdict; and 3. Where one of the parties failed to pursue his litigation, in consequence of which the action was prematurely terminated, as in case of judgments by default, *cognovit, non pros*, nonsuit, and the like.

Judgments were also *interlocutory* or *final*. The former were such as were given in some intermediate stage of the cause, upon some plea or proceeding which did not finally determine or complete the suit; or they were such as merely determined the right of the plaintiff to recover, without ascertaining the amount to which he was entitled, and which required further proceedings to render them complete. Of this description were judgments on default, and, in some cases, on demurrer.

Final judgments were such as at once put an end to the action, by declaring that the plaintiff had or had not entitled himself to recover the debt or damages sued for; and they were

Judgments on issues of law.

either rendered in the first instance, or as consequent to the entry of an interlocutory judgment. It is to be remembered that, under the former system, when the defendant failed to make his defense by pleading within the proper time, his default was entered in the book of common rules, and upon that, an order was entered directing that judgment pass against the defendant. In actions of debt upon bond for the payment of money, the judgment on default was *final*, as no proceedings were necessary to ascertain the amount due to the plaintiff.

But in actions sounding in damages, as assumpsit, covenant, trespass, case and replevin, and some others, the judgment on the default was, in the first instance, merely *interlocutory*, that is, intermediate and incomplete, establishing the plaintiff's *right* to recover, but leaving the *quantum* of damages to be judicially ascertained. This was done by a reference to one of the clerks, or by a sheriff's jury. After the assessment of the damages in either mode, a final judgment was entered.

Section 2. Judgments on issues of law. The judgment on the decision of a demurrer was usually awarded by the court at the time of delivering their opinions. The judgment for the plaintiff on a demurrer to a plea in abatement, or on demurrer to a replication to such a plea, was that the defendant answer over or plead anew. On all other issues in law arising on the pleading, the judgment was, that the plaintiff *do recover*; and it was either final or interlocutory, according to the form of the action. If the judgment was interlocutory, further proceedings were taken for the assessment of damages, after which, final judgment was entered.

Upon a demurrer to a plea in abatement, or to the replication to such plea, a judgment in the defendant's favor, was, that the plaintiff's *bill* (or *writ*) be *quashed*, which defeated that action with costs to the defendant, but leaving the plaintiff's right of action on a future occasion unimpaired. On all other issues in law arising on the pleadings, the judgment for the defendant was, that the plaintiff *take nothing by his bill* (or *writ*, or *declaration*), and that the defendant should recover his costs. By this judgment, not only the present suit but the plaintiff's right of action in any case was defeated entirely. The difference between the former system and the present, in relation to pleading matters in abatement, will be seen by a comparison of the two modes.

Judgments on issues of fact — Nature and form of judgments.

Section 3. Judgments on issues of fact. On issues of law the judgment was pronounced at the time of deciding the issue. But, in the case of a verdict rendered on the trial of an issue in *fact*, there was no such actual award of judgment. The supposition was, that, after the trial at the circuit, the successful party appeared in court in banc, and on exhibiting and filing the pleadings and minutes of the trial, showing its result, moved for and obtained a rule for judgment according to the verdict. In point of fact, there was no such appearance or motion, and no actual delivery of judgment. The whole effect of these proceedings was had and expressed by a *common rule*, which was entered in the clerk's office, *as of course*, by the attorney for the prevailing party, on filing the necessary papers, whether the issue joined was one on a pleading in abatement or in bar of the action, the judgment on a verdict in favor of the plaintiff, was in either case *that he recover*, according to the nature of the action.

If issue was joined on a plea in abatement, and the plea was found true by the jury, the judgment in every form of action was, that the plaintiff's *bill* (or *writ*) be *quashed*, and that the defendant recovers his costs.

If issue was joined on a plea in bar, and a verdict was found in favor of the defendant, the judgment was, that the plaintiff *take nothing by his bill*, and that the defendant recover his costs. A principal quality of the judgment rendered on an issue of fact tried by a jury, was, that it was always *final*, as distinguished from the interlocutory judgments which have been mentioned; for the jury, when they found for the plaintiff, always assessed his damages at the time of delivering their verdict. The delay in entering judgments or the proceedings in suspension, will not be here noticed.

Section 4. Nature and form of judgments. A statement in detail of all the forms and modes of entering judgments need not be made. It is sufficient to state generally that the record was so made up as to show all the principal steps taken in the course of the action, from its commencement until the filing of the record.

ARTICLE IX.

THE EXECUTION.

Section 1. In general. The practice in relation to executions has been changed in some respects, but, on the whole, remains substantially as before, as to the sale of property, or the arrest of the body. See Code, § 291.

Section 2. Execution against property. An execution against real or personal property was enforced much in the same way that it is now done.

Section 3. Execution against the person. There was nothing in the former practice in this respect which requires notice.

Section 4. Non-imprisonment act. This act was passed for the purpose of abolishing imprisonment for debt, and also to aid in the collection of judgments in cases in which the defendant's person could not be taken in execution, according to the provisions of that act. As this remedy is still in force, no further explanation is required.

Section 5. Attachments. The Revised Statutes provided for an attachment of the property of absconding, concealed and non-resident debtors. 2 R. S. 1. This subject has no immediate connection with the subject of executions, yet, as one of the remedies for collecting debts, it is alluded to.

Section 6. Creditor's bill. Whenever an execution against the property of a defendant had been issued on a judgment at law, and returned unsatisfied in whole or in part, the party suing out such execution might file a bill in chancery to compel a discovery of the property of the defendant. 2 R. S. 173, § 38.

Section 7. General remedies. In concluding this subject, it may be stated that a judgment might formerly have been enforced by an execution against property, or against the person, when permitted by law. If these failed of procuring its satisfaction, proceedings by way of a creditor's bill, or under the provisions of the non-imprisonment act, were his only modes of collecting the judgment.

In some cases an attachment might have been procured, but as that was not a remedy intended merely to aid in enforcing judgments, it is not discussed. It was not until the Code pro-

Conclusion.

vided for it that there was an examination or other proceedings supplementary to execution.

Section 8. Writ of error. This proceeding, by way of review of the judgments of the supreme court, was the mode of correcting such errors in law as might have occurred in the various proceedings in the supreme court. The court for the correction of errors was the highest appellate tribunal in this State under the former practice. See the title, Court of Appeals, in this work. The supreme court also corrected errors in fact which might have occurred in that court. And it also corrected the errors of inferior courts, whether the error was of fact or of law.

Section 9. Conclusion. From this brief sketch the student will perceive that though the changes in the practice are important in relation to particulars, it remains unchanged in the great essentials of an action. In the subsequent parts of this work the details of the present practice will be pointed out with care, and with minuteness, and with as much accuracy as can be secured by the most patient labor for that purpose.

CHAPTER III.

PRACTICE IN EQUITY PRIOR TO 1846.

ARTICLE I.

ORGANIZATION OF THE COURT OF CHANCERY.

Section 1. In general. Under the former system, the court of chancery of this State possessed a jurisdiction and power co-extensive with that of the high court of chancery in England, with the exceptions, additions and limitations, created and imposed by the constitution and laws of this State.

The whole power of the courts was vested in the chancellor. He exercised an original jurisdiction in every case co-extensive with the State; and an appellate jurisdiction where a concurrent power was vested in the vice-chancellor.

The circuit judges in each of the eight circuits into which the State was divided, exercised, under the name of vice-chancellors, concurrently with the chancellor, within their respective districts, and exclusive of any other circuit judge, all the powers of the chancellor in the following cases: When either the cause or matter arose within the circuit, or the subject-matter in controversy was situated therein, or the defendants or persons proceeded against, or either of them resided therein, subject to the appellate jurisdiction of the chancellor. The chancellor was authorized, not only to review any decisions of the vice-chancellors on appeal, but also to withdraw a cause from them when it was ready to be set down for a hearing and hear it himself. He might, also, refer to them the hearing or decision of any motion or of any cause set down for hearing before him; and might require them to execute such other powers and duties in relation to any matter in the court of chancery as he should, from time to time, direct; and might, by general rules, prescribe the time and manner in which proceedings might be had, and causes brought to a hearing before them, and the cases in which a rehearing might be had before them. 1 Van Sant. Eq. Pr. 4. The officers of the court were masters, examiners, a register, assist-

Former jurisdiction as to actions for relief.

ant register, clerks, sheriffs, solicitors and counselors. Of these it is only necessary to speak here of the masters and examiners. They were both very important officers in the organization of the court, and to the prosecution of a suit or proceeding in equity. It was the duty of the masters to hear and determine, or report to the court, upon such interlocutory matters in suits or proceedings as might by order be referred to them. It was the duty of examiners to take and reduce to writing all the oral testimony or proof, as it was called, in an equity suit upon which the cause was to be heard by the chancellor, or by any of the vice-chancellors. Under the present practice a referee performs the duties formerly discharged by a master, and the evidence is now taken orally as in actions at law.

ARTICLE II.

FORMER JURISDICTION AS TO ACTIONS FOR RELIEF.

Section 1. In general. It is not intended to discuss at any length, in this place, the character of the jurisdiction of the court, further than to point out the principal actions or cases which were regarded as proper subjects for equitable interference or relief.

In Adams' Equity will be found an explanation of the principal cases in which courts of equity have usually acted. The first subject mentioned in that work is "Discovery," which is the power to compel a defendant to disclose such facts, knowledge, information or belief, as he may be able, if they are material to the plaintiff's case. And this rule was carried so far as to compel a discovery in equity, for the purpose of using the evidence in an action at law. There was also a similar jurisdiction in suits for a commission to examine witnesses abroad, or for the perpetuation of testimony, or for examinations *de bene esse*. Of those cases in which courts of ordinary jurisdiction could not enforce a right, may be mentioned the following: Trusts, both ordinary and charitable; Specific performance; Election; Imperfect consideration; Discharge by matter *in pais* of contracts under seal; Mortgages, perfect or imperfect; Conversion; Priorities; Tacking; Re-execution; Correction; Rescission and Cancellation; Injunctions against proceeding at law; Bills of peace; Bills of interpleader; Injunction against Tort.

Mode of commencing a chancery suit.

Again, those cases in which ordinary courts could not administer a right, were the following: Account; Partition; Assignment of dower; Subtraction of tithes; Ascertainment of boundary; Partnership; Administration of testamentary assets; Contribution and exoneration; Marshalling; Infancy; and Idiocy and Lunacy.

For full information as to this subject, the student is referred to those works devoted to an exposition of the principles of equity jurisprudence. But enough has been stated to show that a large number of cases were regarded as within the peculiar jurisdiction of a court of equity. All such cases are now within the jurisdiction of the supreme court, which acts in the capacity of a court of equity, in all equitable matters, while the same court, held by this same judge, also acts as a court of law in all legal actions.

ARTICLE III.

MODE OF COMMENCING A CHANCERY SUIT.

Section 1. In general. A suit in equity, when commenced by what was called an original bill, was either for *relief*, that is, praying the decree of the court upon some right or claim, insisted upon by the plaintiff, in opposition to those set up by the defendant; or for *discovery*, or to obtain and perpetuate the testimony of witnesses.

In either of those cases, under the old practice in chancery, the appearance, as it was called, of the defendant was essential to enable the complainant to obtain either relief or discovery; for, previous to the establishment of rules by the chancellor, under the authority of the Revised Statutes, no bill could be taken as confessed, until the appearance of the defendant had been entered. In case of a bill of discovery, an answer was, of course, essential to the remedy sought, and such answer could not be put in until after appearance; and, therefore, the first step on the part of the complainant in an equity suit was to compel an *appearance* by the defendant.

Section 2. Equity suit how commenced. An equity suit was commenced by filing in the proper office a bill of complaint, which contained a statement of the facts, out of which the complainant's claim had arisen, and praying the relief sought in the

Parties and pleadings in a suit in equity.

action ; and also process of *subpœna* to compel the defendant to appear and answer the bill. Upon filing the bill, a writ of *subpœna* issued, commanding the defendant to appear in court on a certain day, before the chancellor, or the proper vice-chancellor, to answer the bill of complaint.

Upon the service of the *subpœna* on the defendant, he was bound to enter his appearance within twenty days after the appearance day mentioned in the writ. If he neglected or refused so to do, the complainant obtained an order of course that an attachment issue. There was ample provision for compelling an appearance either by natural persons or by corporations.

Such extreme proceedings were, however, seldom needed, as a resident defendant usually answered in due time and manner ; and in the case of a non-resident, absent or concealed defendant, when no personal service could be made, the law authorized a publication to be made against him, and directed his appearance to be entered. If he then failed to answer, the bill was ordered to be taken as confessed.

ARTICLE IV.

PARTIES TO A SUIT IN EQUITY.

Section 1. In general. As the present practice is generally the same as the former chancery practice, in relation to the parties to the action, no explanations are required.

ARTICLE V.

PLEADINGS IN A SUIT IN EQUITY.

Section 1. In general. The defendant having appeared, if he determined to contest the plaintiff's claim, proceeded to obtain a copy of the bill and to make preparation for putting in his defense, which was either by demurrer, plea or answer.

A *demurrer* might be interposed when it appeared on the face of the bill, that there was no equity in the case on the part of the complainant.

A *plea* was proper when it was desired to set up some matter of defense, which did not appear in the bill, but which was suffi-

Trial of suits in equity.

cient to show that the suit should be dismissed, delayed or barred.

An *answer* was the most usual mode of defense ; and this pleading either confessed and avoided, or it traversed and denied, the several allegations in the bill ; or it might admit the case made by the bill and submit the questions arising thereon to the court ; or it might ask the judgment of the court upon a new case made by the answer, or it might submit both to the court. All these defenses might be joined ; that is, the defendant might at the same time demur, plead and answer to separate parts of the same bill.

The defendant might, if he chose, put in a *disclaimer* and thus terminate the suit at once, by disclaiming all rights and interest in the matter sought in the bill.

This distinguishing feature of a bill in equity was, that it was not only used as a pleading, or mere statement of the facts constituting the cause of action, but it was also an examination of the defendant. Besides this, the complainant was permitted to set forth collateral circumstances in addition to the facts upon which his claim for relief was based, and by means of special interrogatories in his bill, he might require the defendant to answer under oath as to these interrogatories. The advantage of this proceeding was very great at a time when the parties to an ordinary legal action could not be compelled to testify, and, therefore, bills in equity were frequently filed in aid or defense of actions at law.

ARTICLE VI.

TRIAL OF SUITS IN EQUITY.

Section 1. In general. In reference to the trial of suits in equity, nothing more will be done than to point out some of the principal differences between this mode of trial and that of a trial at law.

Section 2. No jury. The first, and one of the principal distinctions between trials at law and those in equity is, that, as a general rule, no jury is used for the trial of issues of fact raised by the pleadings.

The chancellor might, however, direct the trial of issues by a jury, by an order sending the issues to a court of law for trial,

Decrees in equity suits.

in the ordinary way of trying causes by a jury. Feigned issues might be ordered and disposed of in the same manner.

But the general practice was for the court to decide all matters of fact upon the evidence introduced in the cause.

Section 3. The evidence. Another peculiarity of an equity trial was, that the evidence was taken in writing before the hearing, and afterward submitted in that form to the court, instead of taking the oral statements of the witness, in the usual mode of examining them in a court of law.

As will be seen elsewhere, this rule has been abrogated, and the evidence in equity suits is now taken in the same manner as in actions at law.

ARTICLE VII.

DECREES IN EQUITY SUITS.

Section 1. In general. A decree is a sentence or order of the court, corresponding to the *judgment* of a court of law, pronounced after the hearing or submission of the cause; by which the rights of the parties to the suit are determined and settled according to equity and good conscience.

Decrees are of two kinds — *interlocutory* and *final*.

Section 2. Interlocutory decrees. An interlocutory decree is properly a decree pronounced for the purpose of ascertaining some matter of law or of fact preparatory to a final decree. If some material fact or circumstance, necessary to be made known to the court, is not stated in the pleadings, or is so imperfectly ascertained by them that the court is unable to render a *final* determination between the parties, and a reference to a master, or an inquiry before him, or a trial of the facts before a jury upon a feigned issue, becomes necessary, the decree entered for that purpose is an interlocutory decree; and the court, in the mean time, suspends its final decree, until, by the master's report, or the verdict of the jury, it is enabled to decide *finally*. Among the numerous instances in which a reference to a master is made, for the purpose of obtaining information, may be mentioned the taking of accounts, the sale of estates, the distribution of funds, the ascertainment of debts, or the computation of sums due. This subject is fully explained elsewhere, as a part of the present system of practice.

Section 3. Final decrees. A decree is *final* when all the facts and circumstances material and necessary to a complete explanation of the matters in litigation are brought before the court, and so fully and clearly ascertained, on both sides, that the court is enabled, upon a full consideration of the case made out and relied upon by each party, *finally* to determine between them, according to equity and good conscience. In other words, when a decree finally decides and disposes of the whole merits of the cause, and reserves no further questions or directions for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for its final decision, it is a final decree.

A decree may be final notwithstanding there may be some acts to be done subsequent to the decision, if the consequential directions are contained in the decree. So that no further directions are needed for the purpose of giving the parties the full benefit of the previous decision.

Section 4. Further orders. In some instances decrees, although final in their nature, may require the confirmation of a further order of the court before they can be acted upon.

In some cases it may happen that a final decision upon all the points of the case cannot be made until a future period, as in the case of the distribution of a fund among a particular class of individuals, after the death of a person named, but who is still living. In such instances, the decree is final in some respects, but liberty is reserved for the applications of those interested in such fund, whenever it becomes distributable.

Section 5. Rectifying decrees. Formerly, so long as the decree remained in the form of minutes, or until it had been settled and entered by the register, it might have been rectified upon application to the court by petition or on motion. And even important matters might be brought before the court upon an application to vary the minutes. These applications must have been made to the court or officer by which the decree was pronounced, and the chancellor had no power to alter a decree made by a vice-chancellor, except upon an appeal. After a decree had been settled and entered, the court would not entertain an application to vary it, unless upon consent of all parties, or except as to matters which were quite of course, as where the decree was obviously wrong, or there was a clear mistake by the court or the counsel in drawing it up. The proper mode of having a

Appeals—Execution of decrees.

decree rectified in matters of substance was, by applying to have the cause reheard.

Section 6. Rehearing. A decree which had been entered, but not enrolled, might be reheard if any important error had occurred, or any thing material had been omitted in the decree. A rehearing was not a matter of course, except in cases provided for by the rules of the court. In other cases it rested in the discretion of the chancellor.

ARTICLE VIII.

APPEALS.

Section 1. In general. From the decisions of a vice-chancellor, an appeal might have been brought to the chancellor; and from the decision of the latter, an appeal lay to the court for the correction of errors.

ARTICLE IX.

EXECUTION OF DECREES.

Section 1. In general. It was a general principle of this court that it had power to issue all process which might be necessary to carry its decrees into effectual execution.

If a party neglected or refused to obey a decree, the first step by way of enforcing it was by a writ of execution, which was a process of the court, under its seal, reciting the decree of the court, or the substance, or some part thereof, and requiring obedience to so much of the ordering part as was recited and as it concerned the party to perform.

A writ of assistance was, under ordinary circumstances, the first and only process for giving possession of land under a decree of that court. An injunction was not necessary, before a writ of assistance.

If the decree directed the execution of a deed or other instrument, by a party to the suit, the ordinary process of contempt was employed to enforce their execution.

Decrees against corporations were enforced by a *distringas*, and afterward by a sequestration. Decrees against absent or absconding defendants might be enforced by sequestration of the real or personal estate of the defendant.

ARTICLE X.

INTERLOCUTORY APPLICATIONS.

Section 1. In general. Applications to the court for orders were a part of the ordinary practice of this court, and were founded upon petitions or affidavits. As these applications were frequently made for such orders or relief as have been retained under the present practice, no further notice need be taken of them.

In this very brief and imperfect sketch of chancery practice, the object has been to direct the attention of the student to those features which distinguish a court of equity from a court of law, in its general modes of practice. Every industrious and thorough student will desire to be generally informed as to the nature and principles of the former practice in equity, as well as in actions at law, for it is by such knowledge that he will be enabled to master all the difficulties of the present practice, and especially in relation to that part of it which constitutes the old practice, that has been expressly retained, for supplying defects in the new system.

CHAPTER IV.

OLD PRACTICE—HOW FAR RETAINED.

ARTICLE I.

IN GENERAL.

Section 1. Judiciary act of 1847. The constitution of 1846 abrogated the court of chancery as a separate organization, and provided for a supreme court which should have a general jurisdiction in law and equity.

Instead of a chancellor and eight vice-chancellors, there were thirty-two supreme court justices, each of whom possessed the ordinary powers of a common-law judge of the supreme court, and, in addition, all the original equity powers of the chancellor or vice-chancellors.

By the act of 1847, chapter 280, section 16, it was declared that the supreme court should possess the powers, and exercise the jurisdiction, previously possessed and exercised by the supreme court and the court of chancery ; and the justices of the supreme court were declared to possess, and to have authority to exercise, the powers and the jurisdiction formerly possessed and exercised by the judges of the supreme court, by the circuit judges, and by the chancellor and the vice-chancellors. This act, however, did not abrogate the general practice of the two courts as separate organizations, each having its own system of practice, except in some particulars, one of which was to provide that the special terms of the supreme court should hear and determine non-enumerated business in suits and proceedings at law, and take testimony and hear and determine suits and proceedings in equity ; and it was further provided, that orders and decrees in suits and proceedings at law, and orders and decrees in equity, might be made by the special terms ; that all suits and proceedings in equity should be first heard and determined at the special term, unless the justice holding such term should direct the same to be heard at a general term. Laws of 1847, ch. 280, § 20. Equity causes, heard at a special term, might be re-heard at general term. *Ib.* Appeals from a vice-chancellor

Old practice expressly retained.

which might be heard by the supreme court, might be first heard at general term. Laws of 1847, ch. 280, § 12.

The testimony in equity cases was required to be taken in the same manner as in actions at law. Const. 1846, art. 6, § 10.

The changes which were made in the mode of practice were merely such as were necessary to carry into effect the plan of uniting law and equity powers in the same court. And, while the same court had both common-law and equity powers, and the same judge administered both kinds of relief, yet the forms under which these powers were executed, and relief administered, were kept as separate as they had been under the old system. Suits in equity and actions at law were commenced in the old mode, and no change was made as to trials, except that the testimony in equity causes was now required to be taken orally before the judge, as was done in common-law actions. No attempt was made to blend the two systems, or to establish a uniform system of pleading and practice, until the enactment of the Code of Procedure, in 1848 and 1849, which declared that the distinction between actions at law and suits in equity was abolished, and that all the forms of such actions and suits were also abolished, and that there should thereafter be but one form of civil actions. To explain how this union of legal and equitable practice has been blended and carried into practical operation is the object of this work.

Section 2. Old practice expressly retained. It is evident, upon the least reflection, that no legislative enactment could possibly anticipate and provide for every possible contingency in practice. The utmost that could be done was to declare by general rules what the ordinary practice should be, and to render the system as complete as practicable by pointing out such details as could be conveniently or usefully specified.

But the legislature foresaw the difficulties of this character which would naturally arise, and provided a general rule for obviating such inconveniences by declaring that, when a case arose in which the provisions of the Code were not adequate, a resort to the old practice might be had. Code, § 468.

The supreme court, by rule 97, have declared, that the old practice at law or in equity may be adopted in cases not provided for by statute or the written rules of the court. It will be observed that the Code does not profess to abrogate the entire practice at law and in equity, as they formerly existed, but

merely abolishes such portions of them as are inconsistent with that act; and it expressly retains such parts of the old practice as may be consistent with the new plan. Code, § 469.

It will be found, in practice, that the older authorities are as constantly consulted upon the principles of practice as they were before the union of law and equity. The mode of applying such principles may be changed, and in many cases the practice in both classes of actions may be rendered uniform; but the principles themselves, and the advantages derived from them, must, in the nature of things, remain substantially unimpaired.

Section 3. Obsolete practice and rules. The practical effect of the Code has been to render obsolete much of the machinery of the old practice. Actions at law cannot now be commenced by writ or declaration, nor a suit in equity by bill and subpoena, because the Code has substituted a summons as the proper process in all such cases.

This is but a single illustration of the changes made, and, in determining what the present practice is, it is important to understand what portions of the old practice have been abrogated, and what retained, and in writing a work upon the subject, it is indispensable that all obsolete matters should be omitted. This, however, is not, in all cases, so easy a task as might be supposed, since there are numerous points in relation to which even the courts are not agreed. For instance, there is a difference of opinion as to the existence of the writ of *ne exeat*, as a subsisting remedy. And this one illustration is but a sample of the doubts and disagreements in relation to other points of practice. In reference to all such matters, each will be carefully examined, and the authorities fully stated in the proper place in this work; and an attempt will be made to reduce the authorities to one harmonious and uniform system, even though some of the conflicting decisions should be laid aside as contrary to the current of authority.

Section 4. Value of the old practice. No error could be greater or more injurious to the student than for him to entertain the opinion that the old systems of practice are now useless. On the contrary, let him remember that those systems were created by some of the most learned judges that have adorned the bench in the olden time. The points settled were such as arose in actual practice, and they were examined and discussed

Value of the old practice.

by learned counsel before they were submitted for decision. The questions raised and decided were so numerous and so varied that they met nearly every exigency that could occur in practice.

It was while those systems were in force that nearly the entire body of English and American law was settled. There were no rights which could not be secured, and no wrongs which could not be redressed by a proper application of the old practice; and it is only by a careful study of the old principles that a full comprehension of the entire body of the present practice is to be attained. Practice is, to a certain extent, a system of arbitrary rules, for it is necessary that there should be some certain settled rule; but, in most cases, the rule adopted will be found to rest upon a satisfactory reason, which may not be found anywhere else so satisfactorily explained as in the old practice decisions. There is no branch of the law in which a complete knowledge of its history, and of its details, is of greater advantage than that of a knowledge of the practice. The questions arising daily in the courts are almost invariably a surprise to the party who has to meet them, and a want of proper information has frequently been a source of annoyance, if not of positive loss. The old practice has a still higher value than many may suppose, for, it is to be remembered, that much of it is unquestioned and settled law to this day.

While the new system is to be enforced in its true spirit, and while attempting to secure all its advantages, let the clearly settled old principles be retained unchanged, so far as this is consistent with the new plan, for it will be found that unnecessary changes are always accompanied by inconveniences that were not, and could not, be foreseen.

The Code has furnished an outline which may be filled up and rendered a harmonious system of practice at law and in equity. But, to do this successfully, there is no safe and reliable course but to adopt and use all the well settled old rules and principles which are consistent with the new plan. From such materials, joined with the later decisions, a complete system of practice may be constructed, which, in the main, will be harmonious, convenient, complete and reliable. To secure this result, let every student contribute his share, by carefully preparing himself for his duties as a practitioner, when he shall enter upon the duties of that profession which he has selected as worthy of his employment during life.

CHAPTER V.

THE PRESENT PRACTICE AND UPON WHAT IT IS FOUNDED.

ARTICLE I.

UNITES LAW AND EQUITY PRACTICE.

Section 1. Chancery abolished and its powers transferred to supreme court. The present chapter will be devoted to an explanation of the principal features of the present practice, and to a brief discussion of the sources or materials upon which it is founded. As we have elsewhere seen, the old court of chancery has been abolished, and all legal and equitable jurisdiction and powers conferred upon the supreme court, which now administers all the remedies or relief which can be granted by the highest court of original jurisdiction in this State.

Section 2. The same judges sit at law or in equity. The present system not only unites legal and equitable actions and remedies, but it also requires their administration by the same judges in both classes of cases. There is one great advantage in this blending of the systems, which is the uniformity of the practice in many points which were exceedingly dissimilar under the old systems; and, since all remedies are administered by the same judge, that certainly which is so desirable in practice may be greatly promoted.

It may be that something has been lost by this change in the mode of holding courts, in so far as a constant study of one subject, or class of subjects, tends to render its possessor more familiar with the entire details of a particular branch of the law. But, if this were conceded, there is the corresponding gain of the experience of a learned judge who is familiar with other general principles which cannot fail to throw light upon all legal subjects which may require his consideration. If a judge who is deeply skilled in the principles of equity is required to preside over a trial at law, his general knowledge will be as available in securing justice as though his knowledge of equity were less, for, while he will regard the general rules of the common

In legal actions, legal forms and practice are adopted.

law, he will also desire to see the equities of the case so considered as to secure actual justice in the result of the trial.

Again, if a common-law judge is required to try an equity case, his convictions of the advantage of settled rules and principles will lead him to regard equity, while at the same time he will desire to see general and well-settled rules established as a guide in all similar litigations. The practical effect of requiring one judge to become familiar with all principles, whether legal or equitable, will be a tendency to a harmonious and uniform mode of administering remedies. There will be no occasion for a study of any branch of the law, to the exclusion of another equally important; and a constant study of both law and equity will give a broader culture and a more extended view of all the principles of the law.

Section 3. In legal actions, legal forms and practice are adopted. So long as there are legal rights and legal remedies, as distinguished from equitable rights and remedies, so long will it be necessary to employ the forms and adopt the practice of courts of law in obtaining legal remedies. It is not intended to state that there may not be many things in the practice which would be appropriate in all cases, whether the action were legal or equitable, for it is the object of the present system of practice to secure as great a uniformity in that respect as possible. But on the other hand, it is equally certain that it is impossible to secure uniformity in the various steps in the practice where the actions themselves are, in their nature, widely dissimilar, and even inconsistent or contradictory. The object of the actions may be the same in a certain sense, and yet the proceedings to secure the result must be materially different. In an action upon a promissory note, or for the foreclosure of a mortgage, the object in each of the cases may be the recovery of money; but the proceedings in the action upon the note would be those of a legal action, while those for the foreclosure of the mortgage would be those of equity, and in many respects the practice in the two actions would be widely different, under any system of practice whether tried in different courts by different judges, or tried in one court, which tries both legal and equitable actions. Again, the object of each of two different actions may be the recovery of damages, but the object of the action cannot affect the practice to be pursued in any kind of action one may choose to commence. For the breach of a con-

In equitable suits equity forms and practice are adopted.

tract, or for an assault and battery, one may have a right of action against the same person, but the proceeding in the actions will differ in some respects, even in an action at law, as both these cases would be. But the contrast in this respect would be much greater between an action for the specific performance of a contract, or that of an action of replevin, in which so many of the steps in the progress of the actions would be so different, and in which the proceedings in the one action would be entirely inappropriate in the other.

It is the part of wisdom to recognize these natural distinctions and to give them full effect. In those actions in which the practice can be made very plain and simple, let it be done, and apply the rule to as many kinds of actions as practicable. But in other actions in which the proceedings must be more complex and technical, and which must be carried on by many different and successive steps, and which must be moulded to secure the rights of distinct parties having separate interests, it is evident that the practice must differ from that of simpler actions.

Section 4. In equitable suits equity forms and practice are adopted. The remarks in the last section have anticipated what might have been said here. The Code has adopted many of the principles of equity practice, and to that extent has rendered a study of its principles and rules desirable if not necessary. That system of practice had many advantages over the common law in those cases where mere equities were to be dealt with. Those advantages are retained under the existing practice, and, although the mode of proceeding has been changed in many particulars, yet the essential principles of equity practice are still in force, and in all equitable suits must be applied.

Section 5. A judgment or a decree is rendered according to the requirements of the particular case. As an illustration of the rule that the practice must be varied to suit the nature of the action, the mode of rendering a judgment or decree is valuable.

In an action of ejectment the judgment provides for the recovery of the possession of land ; in an action of replevin for the recovery of the possession of personal property ; in an action for the breach of a contract, or for a tort, it provides for the recovery of a sum of money as damages, while in an action of an equitable nature the decree might necessarily be far more complicated in its details.

In actions of a legal nature the judgments are generally

Enforcement of judgments and decrees.

uniform, simple and invariable, according to the nature of the case, as has been seen in some of the instances just enumerated.

But, in equitable actions, such a brief entry of a decree would be impracticable, and this results from the nature of the case. In an equitable suit the relief given must be such as to answer all the particular exigencies of the case fully and circumstantially ; it must make binding and authoritative declarations concerning the rights alleged in the pleadings ; it must direct many things to be mutually done and suffered, and must trace out the conduct to be respectively observed by the several parties to the suit, even though those parties may be very numerous, and sustaining various relations, and where, perhaps, some of those named as defendants have a like interest and object as the plaintiff. But this is not the only difference, for, in an equity suit, the court may retain the cause until by successive orders all of the ends of justice in reference to all the parties interested have been effectually secured or carried out.

Section 6. Enforcement of judgments and decrees. As this subject will be treated at length in a subsequent place, it is only necessary to remark that a judgment in an action at law, and a decree in equity, have each of them appropriate and effective methods for securing their enforcement, by proceedings against the property or the person bound to obey them.

Section 7. Uniformity of general practice. While there is a diversity in the practice, corresponding to the nature of the action, yet, there is a very general uniformity in the practice, in relation to such matters or steps as may be similar in all actions. An instance of this may be seen in the case of a summons, which is used for the commencement of all actions whether legal or equitable in their nature.

So, too, the general principles of pleadings are uniform, and the only difference is in the character of the allegations required to sustain particular actions or defenses. Again the general mode of trying actions, and of introducing evidence on the trial, has been so modified as to render the practice quite uniform. And, finally, the mode of entering judgments or decrees, as well as of bringing appeals from them, has been rendered as uniform as was practicable. And, in brief, the object most to be desired in legal proceedings, is a uniformity in the general practice so far as that is attainable ; and where there must be a difference in the methods, that there shall be as much uniformity in each

No error as to proper court — Code furnishes a statutory practice.

case as can be secured ; while in all varieties of actions or proceedings the settled rule shall be observed, and remain unchanged unless modified for substantial reasons.

Section 8. No error as to proper court. A party may fail in his action because it was brought in the wrong court, as by bringing an action of ejectment in a justice's court ; or by instituting a suit in a State court for the purpose of restraining the infringement of a patent right.

Under the former system, a party might commence an action at law, and be defeated because his relief was only attainable by a suit in equity ; or he might be turned out of equity because his remedy was by action at law. But, as the courts are now organized, this difficulty cannot occur ; and, yet, a party must frame his pleadings in such a manner as to entitle him to the relief he may properly demand on the evidence adduced at the trial ; for he will not be permitted to litigate his case upon one ground, and then charge the entire nature of the action to the prejudice of the opposite party. The remedy for an error in this respect will be considered in its proper place.

ARTICLE II.

THE CODE OF PROCEDURE.

Section 1. Furnishes a statutory practice. One of the most general and important changes in the practice of the courts of this State was made by the constitution of 1846, and by the Code of Procedure, which was founded upon it.

From the earliest period of our judicial history, the English practice, at law and in equity, had been followed. From time to time changes in the practice had been made by the courts or by the legislature, but the vast body of the practice remained substantially unchanged.

The union of legal and equitable powers in one court led the way to an entire change in the mode of procedure in the courts. The incongruity and the inconvenience of requiring two systems of practice to be enforced by the same court was tried for a short time, and then abandoned, for the purpose of trying the alleged advantages of the Code, which has had warm supporters and determined opponents ; but, after more than twenty years' experience, it still remains the established system of practice in this State.

Uniformity and simplicity the object.

The principal difference between the nature and force of this new system and that of the old one is, that a statutory rule now regulates much of the practice, while the former system was one built up under the direction, and by the assistance of the courts, while discharging the duty of administering legal or equitable remedies.

Each of these systems has advantages and disadvantages, which are of sufficient importance to require a brief notice.

Section 2. Uniformity and simplicity the object. The great object of the Code was, to secure uniformity in the practice, in all actions, so far as that result was attainable. In addition to this, it was deemed desirable to simplify the practice in every variety of actions or proceedings in the courts. That these two objects have been, in a great degree, secured, is not usually questioned.

Section 3. Stability and certainty expected. That there are advantages in having a fixed rule is conceded by every one, but that it may have corresponding inconveniences is quite equally and certainly true.

A rule established by the legislature must remain until changed or abrogated by the same authority ; and, so long as it remains, must be observed, however inconvenient it may be ; while a rule adopted by the courts may be modified as convenience or the ends of justice may require. But, while certainty and stability were desired and expected, these results have not been fully attained, for, there have been frequent changes in the statute, and there have been numerous conflicting decisions as to the meaning of the various sections of the Code. Yet, as a whole, the object in view has been, in the main, accomplished.

Section 4. Power to change practice. At common law, and especially under the settled system, the courts frequently desired changes in the practice, which they did not feel warranted in making without the authority of a statutory enactment. In equity, and especially at an early day, less difficulty was felt, for its authority was mainly established by assuming the right to exercise its powers whenever they were needed for the attainment of justice and equity. But, as a general thing, that court acted upon the principle that it had no greater right to extend its powers, or to change its practice, than could be exercised by a court of law.

Section 5. Defects and omissions, how supplied. As all expe-

rience has shown, it is not possible to form a statute which shall answer all the purposes in view when it was enacted. The Code forms no exception to this general rule, and, so fully satisfied were the legislature upon this subject, that they provided a mode of supplying such defects and omissions where they could be found in or obtained from the old practice. Code, § 468.

Section 6. Rules. In addition to the power of resorting to the former practice in cases not provided for by the Code, it was also provided that the court should possess the power of making general rules for the regulation of the practice, and for the purpose of supplying such defects as could be remedied by the adoption of general rules. This subject will be further explained in a subsequent article.

Section 7. Amendments. The very numerous amendments of this Code, which have been made since its first enactment, are a convincing proof of the difficulty of framing a statutory system of practice which shall answer all the purposes in view when it was enacted. These amendments were designed to supply such defects as had been discovered to exist in the original or amended act, and, in many cases, the amendment was an improvement and an advantage; and, yet, how many other changes were sometimes rendered necessary in other parts of the statute for the purpose of securing uniformity and harmony in the whole plan. Amendments to an extensive system of practice ought to be made with the greatest care, and upon the advice of the most learned judges and lawyers, for, the evils of frequent changes are sometimes as great, if not greater, than the original defect. It is true that the power of amendment is a valuable one, but its exercise is a matter of such importance that nothing but a material defect should be remedied by it. Let it be remembered that the practice of the court is the law of the court, and that nothing is better calculated to unsettle the practice than frequent changes in its details.

Section 8. Value of a code. The value of a code, as a system of practice, depends upon several particulars. It furnishes a fixed and definite rule; it may and ought to be founded upon a general and a careful consideration of the entire subject, and ought, therefore, to be harmonious and consistent as a whole system; it may be framed from the best portions of any other systems of practice, by selecting such parts as are desirable, and rejecting those which are defective or objectionable; it may unite the most desirable principles and rules of several other systems

Improvements.

by combining them into a single and improved plan ; it may introduce changes upon a more extensive scale than could in any other mode be properly made ; it provides, by general rules, for a great number of particular instances of a similar character, which could not be enumerated in detail ; and any of its general principles may be extended to every proper case as readily and as properly as is done in the case of the rules of the common law or of the principles of equity.

Some of the defects of a code are that it requires a rigid, inflexible course of action, which leaves the courts little or no power of modifying its action or effects when applied in practice ; it is not as generally capable of an extension and adaptation of its rules to new instances by the courts as are the principles of the common law or of those of equity ; its rules or principles are limited in number, and they cannot be increased by the courts by devising and applying new remedies in unforeseen cases ; its construction occasions the accumulation of a large number of volumes of decisions, which is a cause of expense to the profession ; its construction is not uniform, and uncertainty in the practice upon controverted points is a result ; and it is incapable of being improved by the decisions of the courts, as may be done under the other systems of practice.

Section 9. Improvements. It cannot be expected that the legislature will discover all the defects which exist in the Code ; and, besides that, the most effectual way for ascertaining them is to observe them as they occur in actual practice. Whenever it is found that any part of the statute fails to secure the results anticipated, or whenever new advantages may be attained by a change, an amendment of the law will secure those results.

But change and improvement are not the same thing in very many instances. And it is not impossible that as many inconveniences have resulted as advantages have been gained by the indiscriminate amendments that have hitherto been made. In making alterations it is to be remembered that it is scarcely possible to change any one material part of the statute without rendering changes necessary in other parts of it, so as to maintain the unity and consistency of the entire plan ; and, therefore, no change ought to be made in any material matter without a careful consideration of its effect upon the whole act. And one of the most important things in relation to all amendments is the principle that none shall be made unless done for

Adoption elsewhere — In general.

the advantage of the greatest number of those who may be affected by the change. Amendments to serve the purposes of individuals ought never to be made in a general system of statutory practice. If such special legislation should be required, let it be done by a special enactment for the purpose.

Section 10. Adoption elsewhere. The principal features of the New York Code have been approved in other States, and many of them have adopted a similar system of practice, with such modifications or additions as were deemed desirable. If all the States in the Union should adopt a uniform code of practice, the result would be a great benefit to the profession, as it would enable the members of the bar and of the bench, to determine, with certainty, what the practice was in other States, which is not now practicable without considerable inconvenience, or the loss of time, labor and expense for that purpose.

A convention formed from delegates from all of the States might accomplish this desirable result, if each of the States would adopt the general system ; and if all general changes or amendments were to be adopted in the same manner.

ARTICLE III.

STATUTES GENERAL OR SPECIAL.

Section 1. In general. The practice of the different courts has always been regulated, to some extent, by statutory enactments. And, such changes as were deemed necessary have been made, from time to time, by the legislature. When the directions of a general statute are clear and peremptory, all the courts and every judge are alike bound to give full effect to the statute, and they are not at liberty to refuse to set aside a proceeding for irregularity where a form or rule of practice prescribed by the statute has been deviated from ; although the court may relieve a party for a deviation from a mere rule of the court which was adopted independently of the statute.

It can scarcely be expected that the legislature, composed as it usually is of persons most of whom are inexperienced in the form and practical details of the technical proceedings in an action at law, or a suit in equity, should be competent to enact laws in regard to the mere matters of form, or the technical points of practice ; and, until the adoption of the Code, it was con-

English statutes — Former statutes relating to practice.

sidered advisable to leave those matters almost entirely to the judges themselves, because, from their daily observations and their long experience, they could best appreciate the expediency of any new measure of that nature. The Code furnishes a statutory system of practice, but it also gives the judges power to modify or abrogate rules and forms in proper cases, without the trouble, expense and delay of applying to the legislature. This authority relieves the court and the judges from the difficulties which would exist were every rule and form a technical, statutory one which could not be departed from in practice.

• The provisions of the Revised Statutes, relating to the former practice at law or in equity, may be readily found by any one who may desire to examine them.

Section 2. English statutes. The practice of this State having originally been founded upon the English system, it was natural and convenient to adopt many of the English statutes relating to practice. And, during the entire existence of this State the statutes of that country have been examined, and frequently portions of them enacted by our legislature, with such modifications as might be required.

Section 3. Former statutes relating to practice. While the Code was designed to introduce a new, as well as a complete system, so far as that was practicable, yet it was not intended to repeal or abrogate those statutes relating to proceedings in the courts, in those cases where there was no conflict between them and the Code, and where such statutes were as useful now as heretofore. It will be found, on examination, that there are many cases for which the Code does not provide, and for which existing statutes furnish the desired remedy, and, in such cases, the old statute is as much in force as when first enacted. It is neither practicable nor necessary to enumerate all such cases, for, by merely calling attention to the subject, and stating the rule in relation to former statutes, enough has been done for all practical purposes.

Section 4. All statutes of equal authority. It is important to remember that, while the Code furnishes most of the general rules of practice, yet all former statutes, not expressly repealed, or rendered obsolete by later statutes or the constitution, still remain in full force; and they possess the same authority they ever did, or that any other statute now possesses.

This principle is clear as well as obvious, and yet it can do no harm to mention it, as there are some who may think that the Code

Statutes relating to special subjects.

has gone further toward repealing all previous statutes than has actually been done. There are statutes which were enacted after the Code, and they modify the practice established by it, although no reference is made to its provisions. By section 114 of that act, provision is made in reference to actions by or against married women, and yet, by the Laws of 1860, chapter 90, and Laws of 1862, chapter 172, section 7, a material change is made in relation to actions brought by married women. Construction is given to this act in *Rowe v. Smith*, 56 Barb. 417, 38 How. 37, affirmed, 45 N. Y. (6 Hand) 230, in which it was held that the husband need not be joined as a defendant in an action against the wife, for a trespass committed by her cattle on the plaintiff's lands.

The general rule of construction of statutes is, that where a new statute does not, in terms, repeal an old one, both will stand together, so far as effect can be given to both, for repeals by implication are not favored.

Section 5. Statutes relating to special subjects. The public advantages of general laws over special legislation is well understood. And in no case is the evil of such legislation more conspicuous than in matters of practice. Special statutes which affect general rules of practice seldom fail to cause inconvenience, and to unsettle the law and render it incongruous. There may be cases which require special legislation, owing to some defect in the general laws, but it can seldom be the case that an amendment of the general law will not afford adequate relief; and, by this method, there will be less danger of inconsistencies and contradictions between the statutes. It is not intended to discourage the enactment of special statutes where they may be necessary, in order to secure the attainment of justice, or to furnish a sufficient remedy where the old one is insufficient and ineffectual.

Section 6. Necessities for special legislation. There are instances in which legislation for particular cases is indispensable. Where the practice is created by statute, and it is defective in material points, which the courts have no power to remedy, legislation becomes a necessity, or the ends of justice will be defeated. There may be cases in which the practice is so general that it may be perverted so as to injure the interests and rights of others; and in such a case, special legislation which will restrain or prevent the evil will be a public benefit. The granting of injunctions against corporations, and restraining them in such a manner as to

Effect of statutes upon decisions — Decisions of the court.

cause serious loss, is an instance in which a statute was passed to secure the rights of corporations. See Laws of 1870, ch. 151.

Section 7. Effect of statutes upon prior decisions of the courts. When the courts have established a rule of law by solemn decisions, no statute is needed to add to their validity, or to give them full effect. But it frequently happens that the decisions of the courts are rendered obsolete and of no effect. Where a statute introduces a rule which directly conflicts with prior decisions of the courts, such decisions are no longer law, although no reference is made to them by such statute. It is in this way that many of the older decisions, in relation to practice, have been rendered valueless as authorities. Where the Code or any other statute has established a rule, all former inconsistent rules founded upon the decisions of the court must be disregarded, and the statute rule followed. There are other cases in which the statute and the prior decisions are in harmony; in such cases the authority of those decisions remains unimpaired, and they may be resorted to for an exposition of the principles, as well as of the reasons, upon which they were made.

ARTICLE IV.

DECISIONS OF THE COURT.

Section 1. English and American law and equity decisions. The practice of the courts of law and of equity was mainly established by the decisions of those courts. And from the time that a regular system of practice was settled, the volumes of reports of the English and the American courts have been resorted to as the main source of information in cases of doubt or difficulty.

Section 2. Construction of statutes. During the entire existence of these courts there have been statutes relating to the practice, and they have been examined as occasion demanded; but, notwithstanding the existence of such statutes, the true rule of practice has generally been sought for in the reported cases. This was natural, and almost unavoidable; for, although the statute might be imperative and controlling, yet there were so many points unsettled in relation to the true construction of its provisions, that the courts really settled what the correct practice was even when it was founded upon a statute.

Our own system of practice furnishes the strongest illustration of this statement. The Code of Procedure was designed to simplify the practice and reduce its provisions to the smallest practicable compass. It has been in force something over twenty years, and, yet, where is the settled practice now found except in the volumes of the reports which are now numerous, but still rapidly accumulating. There is scarcely a line or a word in that act which has not been the subject of a decision, and, notwithstanding that fact, it is found that questions of practice are constantly before the courts for the purpose of establishing what some clause of the Code really declares.

When it is also remembered that the language of the statute has sometimes been capable of different constructions ; that there were numerous judges in the different courts, each of whom was called upon to give a construction to some of its provisions ; that many of these decisions were made without the advantages of consultation with the other judges, or of examining their decisions, because, though written, they had not been published ; and, when in addition, there must be those natural differences of opinion among judges even when they have heard the same arguments, and read the same statutes and decisions, upon which they are to found their judgments, it is not strange that there has been a want of uniformity in the practice, even when uniformity was one of the great objects of enacting the statute.

The legislature may yet improve the Code and add to its value, but it will still remain for the courts to carry its provisions into effect, and to establish a complete and harmonious system of practice. Much has already been done in that direction, and every year will add to the number of points which the courts will regard as finally settled. But, while the causes which lead to conflicting decisions continue to exist, so long there must be some doubtful points of practice, yet these will form but a small portion of the entire system ; and the profession may, therefore, indulge the hope that a well-considered, convenient and harmonious practice is not an impossibility even when legal and equitable remedies are administered by the same court.

Section 3. Supplying defects in statutes. One of the most useful provisions of the Code is that which permits the court to resort to the old practice for the purpose of supplying any defects which might be found in it. The general plan or framework is established by this statute ; but it does not, and in the nature of

Decisions more flexible than statutes — Rule for all cases.

things it cannot, anticipate and provide for all possible future cases or contingencies. Such defects must be supplied from the vast resources of the common law, and of the equity systems of practice. It is by the use of such authorities that justice may be obtained in all cases; and that a full and complete system may be reared under the vigilant care and by the directing judgment of a learned and honest judiciary.

Section 4. Decisions more flexible than statutes. Where a statute prescribes a rule it must be obeyed, however inconvenient or unjust its requirements may be, for the rule is unbending. The courts have settled it as a principle, that, when a point is once fully settled, it will be followed as an established precedent. This, however, is not an inflexible rule, for it is not at all uncommon for the court to reconsider questions decided, and, upon further consideration, to reverse the previously established rule, and to lay down a different and, perhaps, conflicting doctrine. This power of the court is an invaluable one; for, while it secures all the stability which is desirable, it is also so flexible that it will bend to meet the wants of justice or of public convenience.

Section 5. Furnishes rule for all cases. A statute furnishes a rule in those cases which are expressly provided for, or which are included in some of the incidents of it. But it has no power of extension to new cases, by the mere act of the court. Under the former common-law and equity systems of practice, the courts were able to furnish an appropriate rule of practice for each case as it arose. And it was this quality which enabled those courts to create such wonderful monuments in the way of defining and explaining rights, and of devising and enforcing remedies. The principles of the common law and of equity are very numerous, and they are peculiarly adapted to the necessities which sometimes occur in practice. It is to this vast collection of rules and principles that the court must now resort, in case the statute fails to furnish a proper rule or adequate relief. And, so long as the courts are at liberty to supply defects by resorting to those principles which were developed and applied by the judges and courts under the former practice, there will be no failure of justice for want of a good rule, and no want of symmetry and convenience in the course of legal proceedings.

Section 6. Abrogating or changing decisions. No court can disregard or nullify a statute, if it is constitutional, and is capable of being carried into effect. The court is bound to obey such a

Changing decisions — Decisions when preferable to statutes.

statute, even though it disregards convenience or justice. But a rule established by the decisions of the courts may, as we have seen, be changed by the same court which established it. The remedy for correcting erroneous decisions is not left entirely to the same court which made them; for the mode of reviewing decisions upon appeal is a most effectual method of securing a full deliberation, and a wise and just settlement of all questions. In such cases the appellate court has an opportunity for learning the reasons which governed the court below, and the additional advantage of a full argument by counsel, and a careful examination of previous adjudications upon the same or similar points, and, with the aid of these lights, to render a correct decision. This power of changing the decisions, when that is necessary, and the advantage of consulting other decisions or authorities by the judges, before deciding a point, is one of the most valuable methods that could be devised for securing the creation or adoption and application of the wisest and best rules of practice in every case presented for examination and decision.

Section 7. Decisions when preferable to statutes. While a statute has the advantage of being inflexible, that very circumstance may be one of the greatest objections to it. In matters of practice it is important that there should be a settled rule, but it is equally true that in no other department of legal science is there so great a need of the power of adapting the rules of practice to each case and point as it is presented for decision. And if fixed inflexible rules must be established by any one, it is far better to repose that trust in the courts instead of the legislature. The judges, by constant and careful observation, have discovered the defects that need correction, and, by long study and experience, they are familiar with all the details of the systems of practice in force. Under such circumstances, there can be little room for doubt as to the superior qualifications of the judges to settle the rules of practice. And, if a statutory system is to be continued, no greater improvement could be adopted than that which should provide by statute that the courts should have power in all cases to provide by general rules for all such cases as might arise and were unprovided for by statute. The courts now have authority to resort to the old practice in some instances, but this is not enough. Let the courts have power to make proper rules, and to provide appropriate remedies or relief in all cases which may be brought before them. And let them have the further power of

Principles of law and equity practice — Conflicting authorities.

changing all rules or practices which may be inconsistent with a systematic general plan. If this power had always been possessed by the courts, there would have been no need of a statutory practice; or, if the outline must be created by statute, the filling up and completion of the plan as to details would be safely left to the courts. The common law and the equity system did not invest the judges with sufficient powers for changing the practice, or for establishing a new one. The courts had extensive powers as to the application of settled rules or principles; but they felt restrained from exercising a power of creating or devising new ones, or from deviating from settled rules of law or practice. The power to create a practice must be confided to some man or body of men, and to whom can it be more safely intrusted than to those judges who are to define, construe and apply it?

Section 8. Principles of law and equity practice. Notwithstanding the defects of the former systems of practice at law or in equity, they were generally adequate to the emergencies that required their application. As the result of many centuries' experience, they contained an almost inexhaustible supply of rules and principles which had been adopted by wise and just judges, upon the most careful consideration, after a fair trial in the course of actual practice. To throw all the advantages of these systems aside is not wise, and the more frequently the courts resort to them, in pursuance of the power conferred for that purpose, the more beautiful and useful will the new practice become in its development.

Section 9. Conflicting authorities. There are natural differences of opinion among men, and there have been, and there will continue to be, conflicting decisions upon questions of law. They constitute, however, but a small portion of the great mass of the authorities, and their influence is of a temporary character, for upon further consideration and decisions it will be found that there is generally a well-defined current or balance of authority.

Upon general principles of law or equity the courts do not limit themselves to the decisions of a single State, but extend their researches over the entire field of English and American law. And, when this has been done, a rule is adopted which is most consonant to reason and justice, unless in some case the overwhelming current of local authority is felt to be conclusive.

To found decisions upon a full review of all the authorities has several advantages ; it secures an examination of all the reasons for or against the rule ; it shows in what direction a majority of the courts are proceeding ; it enables the court to profit by the experience of ages gone by, as well as by the wisdom of the present ; it has a tendency to secure uniformity and accuracy in the points settled, and, from some of the numerous decisions reported, there will be found some authority in point, either in facts or principle.

If our courts would examine the conflicting decisions upon the construction to be given to the various sections of the Code, there would ultimately be a clear and satisfactory result attained, and a harmonious practice established.

Section 10. Diversities and uniformities. In all the great essentials of practice there will be a general uniformity, notwithstanding the great diversities in the details. This is true of all legal principles, whether they relate to matters of practice, or to the general principles of jurisprudence. At the present time there is a tendency toward uniformity in the practice of the courts of the different States, several of them having adopted the general plan of the New York Code of Procedure. And should this practice extend to all of the States, much would be done toward securing a uniform American system of practice. In past times, and even at this day, the courts of this country have followed the decisions of the English courts to a greater or lesser extent. And, after the older States of the Union had established systems of practice, the newer States frequently adopted the principles of the decisions made by the courts of such older States. So, too, statutes have been borrowed from the English books, by the different States, as well as by the several States from each other. And, in the adoption of the Code, there is nothing new in the general principle of adopting the systems of law or practice established elsewhere.

ARTICLE V.

RULES OF THE COURT.

Section 1. Nature and object of rules. Rules of court are made for the purpose of declaring what practice shall be pursued in specified cases, and to establish a uniform and known method of

Rules of the court.

proceeding in such general matters as are of daily occurrence, and to save the courts the trouble of making a special order in each particular case.

It is by means of such general rules that the court directs, in advance, and with entire uniformity, what steps shall be taken in many of the proceedings in the action, which steps could not otherwise be regularly taken unless by an express order of the court previously obtained. And, in actual practice, as well as in theory, every step taken in a cause by virtue of a general rule, is actually taken by the express direction of the court, with this qualification, that it is made in advance, and that it applies to all similar cases as well as to the one which is proceeding under those rules.

Section 2. Incidental power to make rules. Every court of record has inherent power, independently of any statute, to make rules for the transaction of its business, provided such rules do not contravene the law of the land. This power has been exercised for a long period, and by all courts of record.

Section 3. Statutory authority to make rules. Under the former practice, the statute gave the supreme court judges and the chancellor the power to make general rules of practice in cases not provided for by statute. 2 R. S. 175, § 46; *id.* 199, §§ 19, 20, 21, 22.

The Code, section 470, confers authority upon specified judges to make general rules to govern several of the courts of record. So, too, the laws of 1870, chapter 408, section 13, provide for the adoption of general rules which are binding upon all courts of record. In pursuance of these statutes, a body of general rules has been adopted; and by the 96th rule so made, the various courts of record and general terms are authorized to make such further rules as they may deem necessary for the transaction of business before them, provided they are not inconsistent with the general rules.

Section 4. Force and effect of rules. The statute which provides for the adoption of a set of general rules, declares that they shall be binding upon all the courts of record of this State, so far as they are applicable to their practice. Laws of 1870, ch. 408, § 13. The Code, section 470, is nearly similar in its provisions.

The binding effect of these rules may be considered in reference to the parties to the actions or proceedings, and in relation to the courts themselves. That the parties are bound by the

rules, and that a disregard of them is an irregularity in the practice, is a well-established principle, which is acted upon every day. And every act which is regularly done in pursuance of a general rule is as valid as though done by the express direction of the court in some particular instance.

Rules deliberately adopted by the whole number or by a majority of the judges, authorized by law to make them, ought to be very generally observed and enforced. And the courts are unwilling to sanction a disregard of them. *Battershall v. Davis*, 23 How. 383; *Matter of Livingston*, 34 N. Y. (7 Tiff.) 555, 582; 2 Abb. N. S. 1, 28.

How far an appellate court will interfere with a disregard of a general rule, see the case last cited and *Coleman v. Nantz*, 63 Penn. St. (13 Smith) 178. When a judge will disregard one of the rules of court, see *Clark v. Brooks*, 26 How. 285.

ARTICLE VI.

DISCRETION OF THE COURT.

Section 1. Necessity for such a power. In every case in which a question arises there must be some mode or principle of decision. To anticipate every conceivable case is not a possibility, and to establish a legal rule which shall cover all future contingencies would be equally impracticable. It is a wise rule which declares that as much shall be done as is practicable, to provide a rule which shall govern each case in accordance with legal principles, instead of leaving the decision to the discretion of the judge. For, where there is a settled legal rule of decision, every one knows what that rule is, and he has a remedy by appeal in case any violation of the rule occurs to his detriment.

But there are many cases in which no general rule can be applied, and in which the interests of the parties and of the public will be best subserved by leaving the disposition of particular questions to the discretion of the judge, upon all the facts appearing in the cause. As the law now stands, there is hardly a general step in the progress of an action which is not more or less liable to be controlled by the discretion of the judge.

As this section was designed to state the general rule, and not to furnish the instances in which a discretion is permitted, it will be sufficient to mention a few examples by way of illustration.

Discretion, how exercised.

If a summons has been served, and the defendant has neglected to answer in due time, it will be discretionary with the court whether to permit him to answer, and even to limit the character of the answer, if one is allowed. In the course of a trial by jury, there are constant instances of the exercise of a discretionary power of the court. So of the selection of a referee to try a cause, so as to questions of costs, and so as to granting or refusing leave to amend pleadings or other proceedings. And these are but a very few of the innumerable instances in which the decision is controlled or influenced by circumstances submitted to the court for its consideration.

This discretion is indispensable to a wise and just administration of the law; for, in multitudes of the instances which occur in practice, the particular circumstances of each case require consideration before a just decision can be made. And no general rules could be adopted which would reach each case and do entire justice. Suppose the case of a motion, which is founded upon affidavits, and opposed by counter affidavits, how much is there that depends upon the facts disclosed, and what general rule could provide for its disposal upon disputed facts, while a learned and experienced judge can secure ample justice after a full hearing of the matter. This discretionary power is one of the most valuable ones that can be possessed or exercised by the courts. That there may be errors in the exercise of such a power is not to be denied; but the same thing is true of an exercise of the powers of the court in deciding ordinary questions of law, which do not depend upon the discretion of the judge, or of the court.

Section 2. Discretion, how exercised. The general principle which ought to govern in the exercise of a discretionary power of the court, is to use it for the furtherance of justice. Where the facts are undisputed and the law well settled, the court has no power over the case except to apply the rules of law. But, where the rules of law are equally well settled, and the facts are in dispute, to be settled upon conflicting evidence; or, where the applicant has no legal right upon which he can insist, but is compelled to ask for what he receives as a favor, or a dispensation with settled rules which he has violated or disregarded, the court may exercise its discretion in such a manner as to secure all just rights of all the parties. There is no power more delicate, and none in which the court has more unlimited authority than

Reviewing exercise of discretion — Usage.

in such cases ; and, for this reason, there is no act of the court which demands or which receives more scrupulous care than this exercise of that legal discretion which the law has confided to the judges of the courts. Such a power is one in which the court may sometimes give relief when the party would be remediless without its exercise. But it is guarded by the corresponding power of imposing such terms and conditions upon the relieved party as will fully secure the rights and interests of the opposite party. In all matters of practice, where so much depends upon the peculiar circumstances of each case, this discretionary power is indispensable, and it is one which is more frequently than any other called into daily use by the necessities of the parties to actions or proceedings in the courts.

Section 3. Reviewing exercise of discretion. It is evident that, from the very nature of this power, its review by a higher tribunal is not ordinarily practicable. The very fact that the exercise of the power is one which is governed by the judgment of the court or judge upon all the facts, instead of a ruling upon a mere legal principle, distinguishes the case from all others. Again, the decision below is not governed by legal rules framed for its guidance ; and, yet, it is not a decision in violation of law, or a mere arbitrary decision according to the caprice of the judge making the decision. The law must confide the power of deciding many questions to the judgment, justice and wisdom of some tribunal, and in this instance it is generally left with the judges or courts below, from whose decision there is, as a general rule, no appeal. It is not to be understood that appellate courts do not sometimes interpose and change or overrule decisions thus made ; and yet this can rarely be done, in the case of a decision which is strictly discretionary, because the moment a decision becomes subject to a review because it has violated a settled legal rule, from that moment the discretionary power ceases to exist in that case.

ARTICLE VII.

USAGE.

Section 1. The practice of the court is the law of the court. Every court is the guardian of its own records, and master of its own practice, and where a practice has long existed it is con-

The practice of the court is the law of the court.

venient to adhere to it, because it is the practice, even though no reason can be assigned for it; for a long standing rule of practice in the law generally stands upon principles that are founded in justice and convenience.

Long usage in the practice of the courts, or of a particular court, may be considered the common law of the court, for the acquiescence in constant proceedings, by the judges, officers and attorneys of the courts, is evidence that it is reasonable, and has not been found objectionable, because if it had, it would have induced a change by the courts, as they have power in most cases to do.

It is important that a usage should be adhered to until expressly altered by statute, or by rule of the court, for if this were not done a practitioner who relied upon the known practice would be misled if there were any sudden or unpromulgated changes, and this sure reason weighs against any change which is not demanded by some necessity.

And in courts like those organized in this State, where there are so many judges who are employed in enforcing the practice, it is indispensable that a settled usage or practice should be observed, for a slight departure by each judge would soon completely unsettle the entire practice.

PART IV.

THE COMMENCEMENT OF ACTIONS.

CHAPTER I.

THE SUMMONS.

ARTICLE I.

ACTIONS COMMENCED BY SUMMONS.

Section 1. In general. Prior to the adoption of the Code, civil actions in the courts of record of this State were commenced either by summons, by writ (*capias ad respondendum*), or by declaration.

The summons was used in actions against corporations only; the *capias*, in actions against persons not privileged from arrest; and the declaration in nearly all actions where no bail was required. 1 Burr. Pr. 86.

The Code abrogated the old forms of procedure, and provided that all civil actions in the courts of record of this State shall be commenced by the issuing and service of a summons, by the voluntary general appearance of the defendant, or by the submission of a case upon which a controversy depends to a court for a final determination. Code, §§ 127, 139, 372.

These are the only modes by which an action can be commenced. *Diefendorf v. Elwood*, 3 How. 285; S. C., 1 Code R. 42; *Akin v. Albany Northern R. R. Co.*, 14 How. 337; *Kendall v. Washburn*, id. 380; *In re Griswold*, 13 Barb. 412; *O'Hara v. Brophy*, 24 How. 379; and see art. 6, *post*, p.

Requisites of a summons.

ARTICLE II.

REQUISITES OF A SUMMONS.

Section 1. In general. The office of a summons is to give to the defendant certain and authentic notice, that an action has been commenced against him ; to apprise him of the nature and amount of the claims of the plaintiff ; and to compel his appearance in court, to answer to these demands, within a time stated, under penalty of forfeiting all subsequent right to dispute their validity, or to prevent their enforcement. *Bulkley v. Bulkley*, 6 Abb. 307.

Although a summons need not follow any prescribed form, it must contain certain requisites that may best be considered in detail. First among these is the title.

Section 2. The title. The Code does not require that the summons shall contain a title, but by the uniform practice of the courts, a title is essential to the regularity of every summons, and indispensable where the summons and complaint are served separately. In the title of the summons are included the name of the court, the place of trial, and the names of the parties, plaintiff and defendant. See *Van Namee v. Peoble*, 9 How. 198. A summons, if served without a complaint, is irregular if it does not contain the name of the court in which the action will be prosecuted. *James v. Kirkpatrick*, 5 How. 241 ; S. C., 3 Code R. 174 ; *Dix v. Palmer*, 5 How. 233 ; S. C., 3 Code R. 214 ; *Walker v. Hubbard*, 4 How. 154 ; *Anonymous*, 2 Code R. 75 ; *Ward v. Stringham*, 1 id. 118. But if the summons and complaint are served together, an omission of the name of the court in the summons will be disregarded if the court is named in the complaint. *Yates v. Blodgett*, 8 How. 278. As the statute does not in express terms require that the court shall be named in the summons, an omission of this nature cannot render the summons void, but only voidable, and the defect may be cured by amendment. Such amendment cannot be claimed as a matter of right, but is wholly within the discretion of the court, and, if denied, furnishes no ground for appeal. *Tallman v. Hinman*, 10 How. 89. As it is as important that the defendant should be informed where the trial will be had, or in what particular court, the summons should specify the place of trial. The name of the

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county only need be given, as the name of the State is never required. *Cook v. Kelsey*, 19 N. Y. (5 Smith) 412; affirming S. C., 8 Abb. 170; 17 How. 134.

Section 3. The direction. The Code simply requires that the summons shall be directed to the defendant. Code, § 128. When the defendant is an individual and is prosecuted in his individual capacity, and is known to the plaintiff, no difficulty can arise in respect to the direction. But where the true name of the defendant is unknown, or the action is against him in an official or representative character, the direction should be modified with the name of the defendant as given in the title. The manner of designating the parties in the title of the summons is discussed in the following section.

Section 4. Names and character of parties. In inserting the names of the parties in the summons it is essential that the full true name of all the parties, plaintiff or defendant, should be given. See *Walker & Co. v. Parkins*, 2 D. & L. 982; *Scott v. Soans*, 3 East, 111; *Bentley v. Smith*, 3 Caines, 170. By the true name is meant the christian name given the party in baptism and the surname of his ancestor. *Bank of Havana v. Magee*, 20 N. Y. (6 Smith) 355. To this general rule there are, however, some exceptions. Thus, it is not allowable to commence an action in the maiden name of a married female. *Traver v. Eighth Avenue R. R.*, 6 Abb. N. S. 46; S. C., 3 Trans. App. 203; 3 Keyes, 497. So where the true name of the party has been long abandoned and another assumed by which he is commonly known, the action may be brought in the assumed name. *Cooper v. Burr*, 45 Barb. 9; *Williams v. Bryant*, 5 Mees. & Wels. 447. Or, if a party is known by two names he may be sued by either. *Eagleston v. Son*, 5 Rob. 640. It is never necessary to give the middle name of parties, or the distinguishing words "Senior" or "Junior," as these words form no part of the name. There are but two names, the christian and surname, by which a party is known to the law. *People v. Cook*, 14 Barb. 259. And see *Petition of John Snook*, 2 Hilt. 566. The importance of giving the true name of the parties in a summons is shown by the fact that a judgment and execution against the property of a defendant designated by a wrong christian name is wholly void, and the parties enforcing such judgment are trespassers. *Farnham v. Hildreth*, 32 Barb. 277, 281; *Moulton v. De Ma Carty*, 6 Rob. 470. So, if an execution is

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issued against the person of the defendant, but under a wrong name, and he is arrested thereon, the sheriff making the arrest is liable to an action for false imprisonment. *Miller v. Foley*, 28 Barb. 630; *Mead v. Haws*, 7 Cow. 332. See *Fisher v. Magnay*, 5 Man. & Grang. 778; *Dunston v. Patterson*, 2 C. B. N. S. 495. This question is more fully discussed under the titles "Execution" and "Arrest."

In actions by or against persons acting in a representative character, it is equally important that the character in which the parties seek to appear should be indicated by the title of the summons, for, in the case of a variance between the summons and the complaint, the summons will control. Thus, where a plaintiff describes himself in the summons as suing in a representative capacity, he cannot by any averments in the complaint maintain an action for a claim due to him individually. *Blanchard v. Strait*, 8 How. 83. So, if he commences his action as an individual; he cannot afterward change the character in which he sues, and recover for a claim held by him in a representative capacity. *McMahon v. Allen*, 12 How. 39; S. C. affirmed, 3 Abb. 89; 1 Hilt. 103. See *Eagle v. Fox*, 8 Abb. 40; S. C., 28 Barb. 473.

If the plaintiff desires to sue in a representative character, the word "*as*" must be inserted between the name of the party and his descriptive title. An omission of this word is fatal to the character in which he seeks to appear; and all other words added to this name will be regarded as mere *descriptio personæ*, and the action as brought, not in another's right, but in his own, as an individual. *Merritt v. Seaman*, 6 N. Y. (2 Seld.) 168, 172; *Sheldon v. Hoy*, 11 How. 11; *Worden v. Worthington*, 2 Barb. 368; *Root v. Price*, 22 How. 372; *Ogdensburgh Bank v. Van Rensselaer*, 6 Hill, 240. An action by "A. B., *as* executor, etc.," is properly brought; while an action by "A. B., executor, etc.," is the suit of an individual, whatever may be the averments of the accompanying complaint. *Ib.* Where an action is brought against a county, the party defendant should be designated in the summons as "the Board of Supervisors of," etc.; but where an action is brought against the supervisors as such, the names of the members composing the board should be inserted in the summons, with the name of their office annexed. *Wild v. Supervisors of Columbia County*, 9 How. 315; *Magee v. Cutler*, 43 Barb. 239, 261. And, in general, the individual name

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of a public officer, with the addition of his title of office, should be inserted in the summons in all actions brought by or against him in his official character. *Paige v. Fazackerly*, 36 Barb. 392; *People v. Commissioners of Highways of Seward*, 27 id. 94; *Supervisor of Galway v. Stimson*, 4 Hill, 136.

Actions relating to the property of a religious corporation or society must be brought or defended in the corporate or society name, and not in the name of its officers. *Bundy v. Birdsall*, 29 Barb. 31; *Lowenthal v. Wiseman*, 56 Barb. 490. An action in the name of the president, and describing him as such, will not be sufficient, and will be treated as a mere description of the person. *Ib.* And see Parties to Actions. It often occurs in practice that the plaintiff is ignorant of the true name of the party defendant. The Code authorizes him, in such cases, to substitute any fictitious name for the name of the defendant, and on the discovery of the true name, to amend the summons accordingly. Code, § 175. But it is only when the name of the defendant is unknown, that this course is allowable. *Crandall v. Beach*, 7 How. 271. It is advisable, if not necessary, to insert with the fictitious name some description by which the unknown party may be identified. See *Pindar v. Black*, 4 How. 95; S. C., 2 Code R. 53. And the complaint must show that the name employed is fictitious and the true one unknown. *Crandall v. Beach*, 7 How. 271. But while the law allows two fictitious names to be inserted when either of the real ones are unknown, it does not recognise a separate single letter as a name; and if either the christian or surname of the defendant is unknown, the plaintiff should proceed as if neither were known. See *Frank v. Levie*, 5 Rob. 599. Not only will the court in all cases require, that the full name of the plaintiff shall be given, but, in proper cases, will compel the attorney for the plaintiff to disclose the residence and occupation of his client. These facts are supposed to be always within the knowledge of the attorney and must be disclosed when the rights of the defendant require it. *Vincent v. Vanderbilt*, 10 How. 324; S. C., 1 Abb. 193; 4 Duer, 632; *Harris v. Holler*, 7 Dowl. and L. 319; *Cox v. Bockett*, 18 C. B. N. S. 239; 11 Jur. N. S. 88; *Malpar v. Mudd*, 3 Hurlst. and N. 246. If the description of the residence is not sufficient, the proceedings of the plaintiff will be stayed until he gives a more accurate and proper one. *Hodson v. Gamble*, 3 D. P. C. 174. An attorney who gives a false residence of his client, without using

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proper means to ascertain whether it is correct or not, subjects himself to the costs of an attachment issued against him, though he is not liable to the costs of the action where he is unable to give his client's residence, after due inquiry. *Neal v. Holden*, 3 Dowl. P. C. 493.

Section 5. The subscription. Prior to the amendment of the Code in 1870, a summons might be subscribed by either the plaintiff or his attorney. But the Code as amended requires that the signature shall be that of the attorney only. Code, § 128. By attorney must be understood, not a mere agent, but an attorney at law. *Weare v. Slocum*, 3 How. 397; S. C., 1 Code R. 105; *Dixey v. Pollock*, 8 Cal. 570. See *Hall v. Sawyer*, 47 Barb. 116. The form of the signature is immaterial if it conveys to the adverse party the name and residence of the party issuing it. Thus where the summons is issued by a law firm, it is sufficient to give the firm name without setting forth the christian names of the individual members. *Bank of Geneva v. Rice*, 12 Wend. 424. See *Sluyter v. Smith*, 2 Bosw. 673. The old rule of the courts, requiring a written subscription, no longer exists; and if the name of the attorney is printed upon the summons, the signature will be sufficient within the requirements of the Code. *Barnard v. Heydrick*, 49 Barb. 62; S. C., 2 Abb. N. S. 47; 32 How. 97; *Mutual Ins. Co. v. Ross*, 10 Abb. 260, note. But, in addition to the subscription required by the Code, a rule of the court requires the attorney to add to his name his place of business, and provides that if he shall neglect to do so, papers may be served on him at his place of residence, through the mail, by directing them according to the best information which can conveniently be obtained concerning his residence. The postage of papers so served must be prepaid. If neither place of business or residence can be found, service may be made by filing the papers with the clerk. This rule applies to a party who prosecutes or defends in person, whether he be an attorney or not. Rule 13, Supreme Court. The object of this rule is to require both parties to the action to designate a place where they will serve and where they will receive their papers. An attorney having fixed his place of residence by the subscription of the summons in the manner prescribed by the rule, can serve papers by mail upon the opposite party from that place only, and the only manner by which the opposite party can make service upon him

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by mail, is by addressing him at that place. *Hurd v. Davis*, 13 How. 57.

Section 6. Misnomer of parties. Under the former practice a defendant's remedy against misnomer was by way of a plea in abatement, and a neglect to interpose such a plea waived any advantage to the defendant which might result therefrom. But pleas in abatement were abolished by the Code, and the only mode of presenting such a defense, under the present practice, is by answer. *Bank of Havana v. Magee*, 20 N. Y. (6 Smith) 355; *Traver v. Eighth Avenue Railroad Company*, 3 Keyes, 497; S. C., 3 Trans. App. 203; 6 Abb. N. S. 46. The court will not entertain a motion to set aside a summons on the ground of a misnomer of the party defendant. *Miller v. Stettiner*, 7 Bosw. 692; S. C., 22 How. 518. The objection to the defect in the summons having been properly set forth in the answer, the court may on the trial order the proper amendment. This power is given by section 173 of the Code, in which it is provided that the court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of a party, or by correcting a mistake in the name of a party, or a mistake in any other respect. If the defendant appears, and does not set up this defense in his answer, he will be deemed to have waived the objection. *Bank of Havana v. Magee*, 20 N. Y. (6 Smith) 355; *Traver v. Eighth Avenue Railroad Company*, 3 Keyes, 497; S. C., 3 Trans. App. 203; 6 Abb. N. S. 46; *Miller v. Stettiner*, 22 How. 518; 7 Bosw. 692. But a failure to appear and defend does not deprive the defendant of the right to prevent the sale of his property on an execution not directed against it. Thus, where a defendant sued by a wrong name fails to appear in the action, he does not waive his right to object to the misnomer, even after judgment and execution. *Farnham v. Hildreth*, 32 Barb. 277, 281; *Moulton v. de ma Carty*, 6 Rob. 470. Neither can the court on the application of the party plaintiff amend the process and pleadings in the cause, under the authority of section 173 of the Code, if the defendant fails to appear. Service of summons upon a party by a wrong name does not give the court jurisdiction over his person, and his appearance cannot be compelled, nor can jurisdiction be acquired by amendments after service. *Ib.*; *Hoffman v. Fish*, 18 Abb. 76; *Cole v. Hindson*, 6 Term R. 234; *Griswold v. Sedgwick*, 6 Cow. 456.

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The omission of a descriptive word, as *junior* or *senior*, or the middle letter between the christian and surname, is no misnomer, and needs no remedy. See *People v. Cook*, 14 Barb. 259, 261.

ARTICLE III.

THE NOTICE TO BE INSERTED IN THE SUMMONS.

Section 1. In general. No question more frequently or more seriously perplexes the practitioner than to determine whether the notice of judgment in the summons is the proper one to be adopted in some particular case. To reconcile all the decisions that have been made in relation to this question is not possible; and to find a full, clear and intelligible rule for determining which form of notice is proper in all the various cases which arise in actual practice, is the precise thing most desired by the profession.

It may be well to notice, in the first place, some of those points about which there is no question. One of these is, that under the first subdivision of section 129 *the action must be one that arose upon contract.*

Every express contract falls under this rule, whether oral, or written and sealed, or written but unsealed. Actions for penalties given by statute, and actions upon judgments, are regarded as of this character. But whether any or all implied contracts fall within the same rule of construction is not settled by the cases.

The second admitted rule is, *that the recovery sought must be one for money only.* But there are numerous questions here that require settlement. Must the contract specify in express terms the precise sum recoverable? Are actions for the recovery of liquidated damages within this rule? If the existence of the contract, whether express or implied, and the fact of its breach is also clear, but the amount of damages recoverable is unliquidated and is to be assessed upon the evidence, is this a case under subdivision one? If the terms of the contract are *express* and clear, but the recovery depends upon fixing the value of property or services, does the case fall under the same subdivision? If the contract is merely an *implied* one, and the value of property or services is to be fixed, what is the proper notice?

A third settled rule is, *that all actions not arising on contract,*

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nor for the recovery of money only, must fall under subdivision two of this section.

Many cases will be very clearly within this subdivision. Of this kind will be all actions for a tort or a wrong unconnected with contract; all actions for the breach of a contract when unliquidated damages for the breach constitute the sole ground of recovery; all actions in which nothing is sought but equitable relief; all actions in which damages are claimed for a fraud; all actions founded on what the law regards as wrongs although arising out of contract. But how is the rule where the action is brought to recover back money which has been paid on a contract procured through fraud; and where the action is founded upon a repudiation or a rescission of the contract?

A fourth settled rule is, *that the notice cannot be in the alternative, nor under both combined.*

For the convenience of the practitioner, nothing is more important than the adoption of some settled rule which is easily and certainly applied to each particular case as it arises. Such a rule ought to be in harmony with the statute, and a true construction of its spirit and intent. But, if there is a doubt as to the true meaning of the statute, it ought to be amended; or, if that is not done, the courts ought to establish some certain rule as a guide; for, it is of the utmost importance in such cases, that there should be an established rule which may be readily applied by every intelligent lawyer. A clear, well-known, and settled rule is of the highest importance to parties, to attorneys and to the court itself, as it secures the rights of litigants and saves the time of the courts. It is evident that there has not, as yet, been any general principle of construction adopted, since the decisions are far from being in harmony, either as to the actual decision, or as to the principle upon which it was founded. For the purpose of suggesting a general mode of framing notices under this section, the following general rules are given:

Section 2. Rule relating to the first subdivision. A notice under this subdivision is proper in all cases in which the plaintiff is entitled to recover a particular sum which is specified in express terms in the contract; or, where such sum may be ascertained from the language and terms employed in the contract; or where the law authorizes the recovery of a fixed sum, and it treats the recovery as one founded upon contract, although there may be no actual contract.

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Under this rule all express contracts are included, whether oral or written, sealed or unsealed. Actions upon judgments, and for the recovery of penalties given by statute, are treated as contracts, and besides are for a fixed sum and thus fall within this subdivision.

But this form of notice is limited to cases arising upon *express* contracts, or to legal liabilities in the nature of a contract, and where, in both classes of cases, a specific sum is to be recovered.

All other cases of *implied* contracts are excluded for the reason that upon implied contracts there is no fixed sum as a ground of action, and because no fixed sum can be ascertained by calculation or computation.

By this rule, if the contract and its breach are admitted, or proved, the plaintiff is entitled to recover a specified sum without further proof, unless it should be a mere computation, as in the case of computing interest.

Were it not for the rules that the contract must be *express*, and the amount of the recovery *certain*, there might be a large class of cases included under the first subdivision. There are numerous causes of action arising out of *implied* contracts, where the plaintiff need only prove the contract and its breach; and, besides that, the value of property or services, as in case of actions upon the common counts for goods sold and delivered, for services rendered, and the like cases. There are instances in which such cases would seem to fall under the first subdivision; but if *implied* contracts are admitted in one instance, what rule determines their exclusion in other instances? Cases may arise daily in which goods sold, or services rendered, were to be paid for by the terms of an *express* contract and at specified prices, while other goods and services, in the same account, were left to an implied contract, as to value. In all such cases where there are causes of action which may be joined in the same complaint and where some of them might be classed under the first, and others under the second subdivision, it would be a practicable rule to frame the notice under the second subdivision.

When such causes of action cannot properly be separated, as in the case of the items of an account; or, where the causes of action may be properly joined, but need not necessarily be so united, and where a part of the cause of action arises under the first, and the rest under the second subdivision, it would be an

Summons — Rule and decisions relating to subdivision one and two.

intelligible rule to frame the notice under the latter clause of the section.

It will readily occur, that there are numerous causes of action which may be joined in a single complaint; and, where, in one count, a specific sum is recoverable as upon a promissory note, while in another count the sum is uncertain; as in a claim for goods sold, where no price was agreed upon—and since *both* causes of action cannot properly be placed under either form of notice, the Code provides that all other actions which cannot be arranged under the first subdivision shall be placed under the second. Code, § 129, subd. 2.

Section 3. Rule as to subdivision 2. Under this subdivision ought to be included all actions for the recovery of damages for torts, or wrongs unconnected with contract, or actions for the breach of any contract, whether verbal or written, sealed or unsealed, express or implied, where the amount of damages is not fixed by the contract, but is unliquidated, and is to be established by evidence; or where the relief sought is of an equitable nature; or where the action is for the recovery of real or personal property; and besides these must be included all actions not embraced by the first subdivision.

These general rules are supposed to harmonize with section 246 of the Code, which is intended to provide for the rendition of a judgment according to the form of the notice in the summons.

The cases collected in the two following sections are classified and arranged with a view to show the state of the decisions relating to these questions, so far as they are settled, and also to show how far there is a conflict of authorities.

Section 4. Decisions relating to subdivision 1. It has been decided in the following cases that the summons in an action for the recovery of *liquidated damages* should be framed under subdivision 1 of section 129 of the Code. Thus, all actions brought to recover liquidated damages expressed in a *contract to convey lands* should be commenced by a summons so framed. *Cemetery Board of Hyde Park v. Teller*, 8 How. 504. The same rule applies to actions for the recovery of *money deposited*. *Goff v. Edgerton*, 18 Abb. 381. Or for *penalties* given by statute. *People v. Bennett*, 5 id. 384; S. C., 6 id. 343; *Board of Excise v. Classon*, 17 How. 193. Or to actions upon an *undertaking* given pursuant to section 209 of the Code. *Montegriffo v. Musti*, 1 Daly, 77.

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Summons — Decisions relating to subdivision two.

It has also been decided that actions for *unliquidated damages* may be properly commenced by a summons framed under subdivision 1.

Thus, a summons so framed was decided to be in the proper form in an action for a *breach of promise to marry*. *Williams v. Miller*, 4 How. 94; S. C., 2 Code R. 55; *Leopold v. Popenheimer*, 1 id. 39. And the same rule was applied to actions against *common carriers* for a loss of goods. *Trapp v. New York & Erie Railroad Company*, 6 How. 237; S. C., 1 Code R. N. S. 384.

To actions for goods sold, price not specified. *Dibble v. Mason*, 1 Code R. 37; S. C., 6 N. Y. Leg. Obs. 365; *Champlin v. Deitz*, 37 How. 214; *Mason v. Hand*, 1 Lans. 66.

And to actions for damages for refusal to convey lands. *Croden v. Drew*, 3 Duer, 652.

In the following cases it was decided that an action was properly commenced by a summons under the first subdivision, although a claim for damages upon a *quantum meruit* was joined with a demand arising upon a contract to pay a fixed sum. *Champlin v. Deitz*, 37 How. 214; *Mason v. Hand*, 1 Lans. 66.

Section 5. Decisions relating to subdivision 2. The following cases have been decided to properly fall under the second subdivision of section 129 :

Account. Actions for an account of moneys collected by an attorney. *West v. Brewster*, 1 Duer, 647; S. C., 11 N. Y. Leg. Obs. 157. And see *McDougal v. Cooper*, 31 N. Y. (4 Tiff.) 498.

Breach of promise. Actions for breach of promise to marry. *Davis v. Bates*, 6 Abb. 15; *McNeff v. Short*, 14 How. 463; *McDonald v. Walsh*, 5 Abb. 68; *Barnes v. Buck*, 1 Lans. 268.

Carriers. Actions against common carriers. *Luling v. Stanton*, 8 Abb. 378; S. C., 2 Hilt. 538; *Clor v. Mallory*, 1 Code R. 126; *Flynn v. Hudson River Railroad Company*, 6 How. 308; S. C., 10 N. Y. Leg. Obs. 158; *Hewitt v. Howell*, 8 How. 347. And see *Campbell v. Perkins*, 8 N. Y. (4 Seld.) 430, 438.

Creditor's bill. Actions in the nature of a creditor's bill, to set aside transfers of property on the ground of fraud. *Shafer v. Humphrey*, 15 How. 564.

Foreclosure. All actions for foreclosure. *Wyant v. Reeves*, 1 Code R. 49.

Fraud, etc. In many cases it has been laid down as a rule, that all actions arising on contract but sounding in tort, or which

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are based on allegations of fraud, must be commenced by a summons under subdivision 2. *Field v. Morse*, 7 How. 12; *Travis v. Tobias*, 7 id. 90; *Hartshorn v. Newman*, 15 Abb. 63.

The rule has been applied to actions for damages arising from the false and fraudulent representations of the defendant. *Atwill v. LeRoy*, 4 Abb. 438; S. C., 15 How. 227. Also to actions for malicious prosecution. *Webb v. Mott*, 6 id. 439. The rule has been also applied to actions for the conversion of personal property. *Voorhies v. Scofield*, 7 How. 51; *Ridder v. Whitlock*, 12 id. 208.

Undertakings. It was also laid down as a rule, that in actions on undertakings, the summons should be for relief. *Kelsey v. Covert*, 15 How. 92; S. C., 6 Abb. 336, note; *Levy v. Nicholas*, 15 id. 63, note.

This rule was also applied to an action on a constable's bond under the act of 1813. *Mayor of New York v. Lyons*, 1 Daly, 296; S. C., 24 How. 280.

Warranty. So in an action for a breach of warranty the summons must be for relief. *Dunn v. Bloomingdale*, 14 How. 474; S. C., 6 Abb. 340, note.

In the following cases it was decided that in an action where the plaintiff set forth demands for a sum specified by the terms of an express contract, joined with a claim for unliquidated damages on an implied contract, the summons should be framed under the second subdivision. *Norton v. Cary*, 23 How. 469; S. C., 14 Abb. 364; *Tuttle v. Smith*, 14 How. 395, 403; S. C., 6 Abb. 329; see, also, *Cobb v. Dunkin*, 19 How. 164, and *People v. Bennett*, 6 Abb. 343, approving *Tuttle v. Smith*.

That the second subdivision of section 129 of the Code contains the proper notice in all actions for unliquidated damages on contracts, express or implied, has been repeatedly asserted in nearly every case before cited in this section. The same rule is still further sustained in the cases of *Garrison v. Carr*, 3 Abb. N. S. 266; S. C., 34 How. 187; *Salters v. Ralph*, 15 Abb. 273; *Johnson v. Paul*, 14 How. 454; S. C., 6 Abb. 335, note.

A summons framed under subdivision 2, and served with the complaint, will not be set aside even if the case should properly fall under the first subdivision. *Brown v. Eaton*, 37 How. 325; *Hemson v. Decker*, 29 id. 385. But, whenever a summons is framed under the first subdivision, and the complaint sets forth a cause of action under the second, the complaint, and not the

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summons, will be set aside. *Brown v. Eaton*, 37 How. 325; *Hemson v. Decker*, 29 id. 385; *Cobb v. Dunkin*, 19 id. 164; *Ridder v. Whitlock*, 12 id. 208; *Johnson v. Paul*, 14 id. 454; *Shafer v. Humphrey*, 15 id. 564; *Bender v. Comstock*, 4 Rob. 644.

Section 6. The notice must be definite and under one form only. The notice of the manner of taking judgment inserted in the summons must be definite and not in the alternative. *Baxter v. Arnold*, 9 How. 445. It will, however, be sufficiently definite, if, in addition to the demand for a specific sum of money, there is also a claim for interest. *De Witt v. Smith*, 3 How. 280; S. C., 6 N. Y. Leg. Obs. 314; 1 Code R. 24.

Section 7. Notice of time and place to serve answer. In addition to the notice of the manner in which judgment will be taken, the summons must, in all cases, require the defendant to answer the complaint, and to serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the State in which there is a post-office, and within twenty days after the service of the summons, exclusive of the day of service. Code, § 128.

Section 8. Variance between summons and complaint. As the object of a summons is to apprise the defendant of the commencement and nature of an action, and bring him into court, all subsequent proceedings are supposed to be based upon it. In all cases of variance between the summons and complaint, the summons controls, and the complaint must be amended to conform thereto, or it may be set aside for irregularity. *Boington v. Lapham*, 14 How. 360; *Allen v. Allen*, id. 248; *Tuttle v. Smith*, id. 395; S. C., 6 Abb. 329; *Ridder v. Whitlock*, 12 How. 208; *Johnson v. Paul*, 14 id. 454; S. C., 6 Abb. 335, n; *Gray v. Brown*, 15 How. 555; *Shafer v. Humphrey*, id. 564; *Davis v. Bates*, 6 Abb. 15; *Follower v. Laughlin*, 12 id. 105; *Campbell v. Wright*, 21 How. 9; *Bender v. Comstock*, 4 Rob. 644.

A complaint may vary from the summons in the title, or in the nature of the relief demanded. In either case, the complaint is irregular, and the defendant's remedy is to move for an order to set aside the complaint. *Allen v. Allen*, 14 How. 249; *Campbell v. Wright*, 21 id. 9.

It will be too late to object to such an irregularity on the trial of the cause. *Willett v. Stewart*, 43 Barb. 98; *Conaughty v. Nichols*, 42 N. Y. (3 Hand) 83. But it is only when the defend-

Summons — Notice, where complaint is not served.

ant has been misled by the variance between the summons and complaint that either can be set aside for such an irregularity. When both summons and complaint are served together, no motion to set aside either can prevail. *Brown v. Eaton*, 37 How. 325. But where a summons under the first subdivision of section 129 of the Code is served without the complaint, and the complaint sets up a cause of action under the second subdivision of that section, the complaint must be set aside on motion; and the irregularity is not waived by the general appearance of the defendant. *Brown v. Eaton*, 37 How. 325; *Hemson v. Decker*, 29 id. 385; *Shafer v. Humphrey*, 15 id. 564; *Johnson v. Paul*, 14 id. 454; S. C., 6 Abb. 355, note. But when the summons contains the notice prescribed by subdivision 2, and the cause of action set forth in the complaint authorizes a judgment without application to the court, the variance will be disregarded unless the defendant has been clearly misled to his prejudice. *Hemson v. Decker*, 29 How. 385; *Brown v. Eaton*, 37 id. 325. If no objection has been made before trial, the variance between the summons and complaint in such cases will not affect the validity of a judgment. *Conaughty v. Nichols*, 42 N. Y. (3 Hand) 83.

Section 9. Notice, where complaint is not served. A copy of the complaint need not be served with the summons. Where it is not so served, the summons must state where the complaint is or will be filed. Code, § 130. A summons served without a copy of the complaint, and which does not state where the complaint is or will be filed, is irregular, and may be set aside on motion. But such a summons is not absolutely void. *Pignolet v. Daveau*, 2 Hilt. 584; *Foster v. Wood*, 30 How. 284; S. C., 1 Abb. N. S. 150; *Keeler v. Belts*, 3 Code R. 183. The defendant's remedy is to move to set aside the summons.

It is the *original* complaint that should be filed; but a statement in the summons that a *copy* had been filed is an immaterial error. *Hart v. Kremer*, 2 Code R. 50.

As to the notice to be inserted in a summons in case of service by publication, see art. 2, § 3, *post*.

The notice to be inserted in or appended to the summons where the defendant is proceeded against under the act of 1842, is given in a subsequent article. See art. 2, § 5.

Section 10. Special indorsements. In an action for a penalty or forfeiture given by a statute, an indorsement must be made

Form of an indorsement on a summons in an action for a penalty.

on the summons, referring in general terms to that statute, either by citing the title of the act, or by referring to the chapter of the session laws where it may be found, giving, at the same time, the day and year of its passage, or by any other method of citation, which shall clearly apprise the defendant of the particular statute under which the action is brought. 2 R. S. 481 (503), § 7; *Perry v. Tynen*, 22 Barb. 137; *Andrews v. Harrington*, 19 id. 343; *Avery v. Slack*, 17 Wend. 85. The form of the indorsement is immaterial, if it meets this requirement; but if it is so general as to leave it uncertain what particular statute the defendant has violated, the indorsement will be insufficient. *Marselis v. Seaman*, 21 Barb. 319; *Avery v. Slack*, 17 Wend. 85.

This indorsement is requisite in such actions only as are *created or given* by some statute.

If the action had an existence independently of the statute, or if the measure of damages only is fixed thereby, no indorsement on the summons referring to such statute is necessary or proper. *Sprague v. Irwin*, 27 How. 51.

As the only object of requiring an indorsement of process in any case is to inform the defendant of a fact he could not learn from the process itself, to-wit: that he is sued for the recovery of a penalty or forfeiture, given for the violation of some statute, the indorsement may be omitted where the action might be commenced by the filing and service of a declaration, as under the former practice, where the declaration contains the information required. See *Thayer v. Lewis*, 4 Denio, 269.

Section 11. Stamps. The law of congress, requiring that a fifty-cent revenue stamp shall be affixed to a summons, was repealed by the laws of 1867, chapter 169, section 9, page 475.

Form of an indorsement on a summons in an action for a penalty.

Issued according to the provisions of the statute concerning the incorporation of turnpike and plank road companies, and the collection of penalties for demanding and receiving more than lawful toll in passing through toll-gates on such roads (*or a similar reference to the statute under which the plaintiff brings his action.*)

Form of summons for money and relief.

Summons for Money — Complaint Served.

SUPREME COURT — COUNTY OF

A. B., plaintiff,	}
agst.	
C. D., defendant.	

To the above-named defendant :

You are hereby summonsd and required to answer the complaint of the *plaintiff* herein, a copy of which is hereto annexed, and to serve a copy of your answer on at , N. Y., within twenty days after the service of such summons, exclusive of the day of service ; and if you fail to so answer said complaint, the *plaintiff* will take judgment against you for dollars and cents, with interest besides costs.

E. F.,

*Plaintiff's Attorney.**Form of a Summons for Money — Complaint not Served.*

SUPREME COURT — COUNTY OF

A. B., plaintiff,	}
agst.	
C. D., defendant.	

To the above-named defendant :

You are hereby summoned and required to answer the complaint of the *plaintiff* in this action, which filed with the clerk of the county of , and to serve a copy of your answer on , at , within twenty days after the service hereof upon you, exclusive of the day of service ; and if you fail to answer said complaint, the *plaintiff* will take judgment against you for dollars and cents, with interest besides costs.

E. F.,

*Plaintiff's Attorney.**Form of a Summons for Relief — Complaint Served.*

SUPREME COURT — COUNTY OF

A. B., plaintiff,	}
agst.	
C. D., defendant.	

To the above-named defendant :

You are hereby summoned and required to answer the complaint of the *plaintiff* herein, a copy of which is hereto annexed, and to serve a copy of your answer on , at , N. Y., within twenty days after the service of this summons, exclusive of the day of service, and if you fail so to answer the complaint the *plaintiff* will apply to the court for the relief demanded in the complaint.

E. F.,

Plaintiff's Attorney.

Issuing or delivering summons for service.

Form of a Summons for Relief — Complaint not Served.

COURT — COUNTY OF

A. B., plaintiff,	}
agst.	
C. D., defendant.	

To the above-named defendant :

You are hereby summoned and required to answer the complaint of the *plaintiff* in this action, which filed with the clerk of the county of , and to serve a copy of your answer on , at , N. Y., within twenty days after the service hereof upon you, exclusive of the day of service ; if you fail to so answer said complaint, the *plaintiff* will apply to the court for the relief demanded in the complaint.

E. F.,
Plaintiff's Attorney.

Section 12. Issuing or delivering summons for service.

Before a summons is delivered to the sheriff to be served, the practitioner should satisfy himself that nothing has been omitted or inserted that will impair its validity. It would be well to carefully scrutinize the title, the subscription and especially the demand for money or relief. As many carefully examined copies of the original should be made as, in any contingency, may be needed in the action. Care in these particulars will frequently be the means of avoiding future delay, annoyance and expense in the conduct of the action.

A summons is "*issued*" when it is made out and placed in the hands of a person authorized to serve it, and with the *bona fide* intent to have it served if practicable. *Mills v. Corbett*, 8 How. 500. In actions under the 227th section of the Code this is all the issuing that is requisite as a preliminary to a warrant of attachment. *Ib.* For the purposes of this section it is not material to whom the summons is delivered for service. But in reference to the statute of limitations it is made imperative that the summons shall be delivered to the *sheriff* or other officer of the county, with the intent that it be actually served. Code, § 99. Ordinarily the time of the issuing and delivery of a summons is of no special importance. But when the fact is otherwise, as where the plaintiff's claim is liable to be barred by the statute of limitations before the summons can be actually served, the plaintiff should take such precautionary measures as may be necessary to secure evidence of the time of delivery for service. A sheriff's

Guardian for infant plaintiff.

indorsement of the time of the receipt of the summons by him will not be sufficient proof; because a sheriff's certificate of any fact which is not required by statute to be stated is of no special value and is not sufficient legal evidence of such fact. *Wardwell v. Patrick*, 1 Bosw. 406. See *Cornell v. Moulton*, 3 Denio, 12; *McGraw v. Walker*, 2 Hilt. 404; 2 R. S. 440, § 75.

Section 13. Guardian for infant plaintiff. Before the issuing and service of a summons in an action in which an infant is a party plaintiff, an application must be made to the proper officer for an order appointing a guardian *ad litem*. Code, § 115; *Hof-tailing v. Teal*, 11 How. 188; *Freyberg v. Pelerin*, 24 id. 202; *Hill v. Thacter*, 2 Code R. 3; S. C., 3 How. 407. The effect of a disregard of this requirement will be discussed in the latter part of this section. In ordinary actions an application for the appointment of a guardian *ad litem* may be made either to the court in which the action is prosecuted, or to a judge thereof, or a county judge. Code, § 115. But in actions for the partition of lands the guardian can be appointed by the court only, and an appointment by a county judge is a nullity. As the practice regulating the appointment of guardians *ad litem* in actions for partition is peculiar to itself, and governed by a special statute, it will be discussed elsewhere. See Actions in Partitions, *post*; Laws of 1852, ch. 277; *Lansing v. Gulick*, 26 How. 250; *Lyle v. Smith*, 13 id. 104; *Varian v. Stevens*, 2 Duer, 635. But see *Towsey v. Harrison*, 25 How. 266.

In all actions, except partition, the appointment may be made upon the application of the infant, if he be of the age of fourteen years, or, if under that age, upon the application of his general or testamentary guardian, if he has any, or of a relative or friend of the infant. If the application is made by a relative or friend, notice of the same must first be given to the general or testamentary guardian of the infant; or, if he has none, then to the person with whom the infant resides. Code, § 116. No person can be appointed guardian *ad litem*, either on the application of the infant or otherwise, unless he be the general guardian of such infant, or is fully competent to understand and protect the rights of the infant, and is a person who has no interests adverse to that of the infant, and is not connected in business with the attorney or counsel of the adverse party. And no person can be appointed such guardian who is not shown by affidavit to be of sufficient ability to answer to the infant for any damage which

Petition by infant plaintiff for the appointment of a guardian *ad litem*.

may be sustained by his negligence or misconduct in the prosecution of the suit. Rule 61, Supreme Court; *Ten Broeck v. Reynolds*, 13 How. 462; *Cook v. Rawdon*, 6 id. 233; S. C., 1 Code R. N. S. 382. On being appointed as guardian, it is the duty of the guardian to prosecute the action, and to employ the ordinary and customary means of bringing it to a successful termination. But his authority is to prosecute, and not to settle, and no settlement made by him can be binding on the infant, except when made with the express sanction of the court. *Edsall v. Vandemark*, 39 Barb. 589. Whenever it appears that the guardian has neglected his trust, the court will, on its own motion, remove him. *Litchfield v. Burwell*, 5 How. 341; S. C., 1 Code R. N. S. 42; 9 N. Y. Leg. Obs. 182. So whenever it appears that the guardian has erred in the discharge of his duties, the court will, on its own motion, correct the error and relieve the plaintiff from the damages resulting therefrom. *Lefevre v. Laraway*, 22 Barb. 167.

A failure to have a guardian *ad litem* appointed for an infant plaintiff before the commencement of the action, is not a jurisdictional defect, and if such infant should attain majority before any objection to this omission is raised, the defect will be cured. *Rutter v. Puckhofer*, 9 Bosw. 638; S. C., 19 Abb. 161, note. But the non-appointment of a guardian is such an irregularity as will entitle the defendant, on motion, to an order setting aside the summons and complaint. *Freyberg v. Pelerin*, 24 How. 202. An application for this order must be made before answer. *Parks v. Parks*, 19 Abb. 161. The defendant is not, however, confined to this remedy. He may plead the irregularity in his answer, in the nature of a plea in abatement. But it is not a ground for a nonsuit. *Treadwell v. Bruder*, 3 E. D. Smith, 596.

Petition by Infant Plaintiff for the Appointment of a Guardian ad litem.

To the Supreme Court of the State of New York:

The petition of A. B. respectfully shows to this court:

I. That your petitioner was of the age of years, on the day of last.

II. That he resides with , and that he has no general guardian appointed, pursuant to law. (Or, state who is the general guardian of the petitioner.)

III. That (state briefly the cause of action).

IV. That your petitioner desires to commence an action in (this) court for the same.

Petition by general guardian for the appointment of a guardian ad litem.

V. That C. D. of (an attorney of this court) is a competent and responsible person for the office of guardian.

Wherefore your petitioner prays that the said C. D., or some other competent person, may be appointed guardian *ad litem* of your petitioner to commence and carry on such action for your petitioner.

(Date.)

(Signature.)

(Venue.)

Verification of the above.

A. B., being duly sworn, says, that he has read the foregoing petition subscribed by him, and knows the contents thereof, and that the same is true, of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

(Jurat.)

(Signature.)

Consent of proposed Guardian, as post, 488.

Petition by General Guardian for the appointment of a Guardian ad litem.

To the Supreme Court of the State of New York :

The petition of G. H. respectfully shows to the court :

I. That your petitioner is the testamentary guardian of A. B., an infant under fourteen years of age, duly appointed by the will of C. B., his father.

II. That the said A. B. was years old on the day of last, and resides at , with the petitioner.

III. That (*state the cause of action*).

IV. That your petitioner is desirous of bringing an action to recover the amount due on the foregoing facts, on behalf of the said A. B.

Wherefore your petitioner asks that C. D., an attorney of this court, who resides at , in this State, and who is a competent and responsible person, and worth dollars over all his debts and liabilities, and property exempt by law from execution, may be appointed guardian *ad litem* of the said A. B., to prosecute said action for him.

(Date.)

(Signature.)

(Verification.)

Consent of proposed Guardian, as post, 488.

Petition by Relative or Friend for appointment of Guardian.

To the Supreme Court of the State of New York :

The petition of E. F. respectfully shows to the court :

I. That A. B., of , is under years of age.

II. That (*state concisely the cause of action*).

III. That it is desirable that an action should be commenced in this court for the recovery of the same.

Consent and affidavit of proposed guardian — Appointing guardian for infant.

IV. That G. H. is the general guardian of the said A. B., but declines to commence an action for the purpose before mentioned, on the ground that

V. That C. D., of _____, an attorney of this court, is a competent and responsible person for the office of guardian.

Wherefore your petitioner prays that the said C. D., or some other competent person, may be appointed guardian *ad litem* of the said A. B., to prosecute said action for him.

(Date.)

(Signature.)

(Verification.)

Consent of Proposed Guardian.

I hereby consent to become the guardian of A. B., to bring the action above referred to.

(Date.)

(Signature.)

Affidavit of Proposed Guardian.

(Venue.)

C. D., being duly sworn, says,

I. That he is an attorney and counselor at law, residing in the _____ of _____.

II. That he has no interests adverse to those of A. B., the infant who desires to have him appointed as guardian, *ad litem*.

III. That he is not connected in business with any attorney or counsel whose interests are adverse to those of the said infant.

IV. That he is worth _____ dollars over all his liabilities.

(Jurat.)

(Signature.)

Notice of application by a friend, to the General Guardian or Person with whom the Infant resides.

Take notice, that I shall apply to Hon. Y. Z., a justice of the court, on the _____ day of _____, 18____, at _____ o'clock in the _____ noon at the _____, in the city of _____, for an order appointing C. D. guardian of A. B. of whom you are general guardian (or who resides with you), for the purpose of bringing an action in the name of the said A. B. against P. Q.

(Dated.)

Yours, etc.

To G. H., Esq.

E. F.

Order appointing a Guardian for Infant Plaintiff.

Name of the court:

In the matter of the petition of (A. B., an infant) for the appointment of a guardian *ad litem*.

At a special term, etc.

On reading and filing the annexed petition of A. B. for the appointment of C. D., Esq., as his guardian *ad litem*, with the

Bond of guardian ad litem for infant plaintiff in partition.

consent of said C. D. to act as such guardian, [and it being made satisfactorily to appear to the court that said C. D. is a competent and responsible person,]

ORDERED: That C. D., Esq., of , be and he hereby is appointed guardian *ad litem* of A. B., infant above named, and authorized to prosecute for him as such guardian, the action mentioned in the annexed petition (*add if such action is for the partition of land*), on his executing to the people of this State, and duly acknowledging and filing, a bond in the penalty of dollars and with sureties, to be approved by a justice of this court, conditioned for the faithful discharge of the trust committed to such guardian, and to render a just and true account of his guardianship, in all courts and places when thereunto required.)

Bond of Guardian ad litem for Infant plaintiff in Partition.

Know all men by these presents, that we, C. D., of , attorney, and E. L., physician, and G. K., merchant, of the same place, are held and firmly bound unto the people of the State of New York, in the penal sum of dollars, for which sum well and truly, be paid, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents. Sealed with our seals, and dated the day of , 18 .

Whereas, by an order made by the court on the day of , 18 , at , said C. D. was appointed guardian *ad litem* of A. B., infant, of , to conduct, on the part of said infant, proceedings to be instituted on his behalf, for a division and partition, or sale of the real estate, mentioned in the petition upon which said order was made, said guardian being required to give security.

Now, therefore, the condition of this obligation is such that if the said E. F. shall faithfully discharge the trust committed to him as such guardian, and render a just and true account thereof in all courts and places when thereunto required, then this obligation to be void, otherwise to remain in full force

(Signatures and Seals.)

Sealed and delivered in presence of .

Acknowledgment and justification.

Approval to be indorsed on the bond.

I approve of the within bond, as to the form and manner of execution, and as to the sufficiency of the sureties.

(Date.)

(Signature of Judge.)

Section 14. Amending summons. The power of amending process in any case does not originate in the Code, but is a power existing in the court, independently of any legislative

Amending summons.

enactment. *Lane v. Beam*, 19 Barb. 51; S. C., 1 Abb. 65. It is, however, provided by the Code, that the court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect. Code, § 173. But a summons can be amended only upon leave of the court. The power of amending once, as of course, conferred on parties to an action by section 172 of the Code, relates to pleadings, and not to process. *Walken-shaw v. Perzel*, 32 How. 310; S. C., 7 Rob. 606; 5 id. 648; *Gray v. Brown*, 15 How. 555; *Allen v. Allen*, 14 id. 248; *McDonald v. Walsh*, 5 Abb. 68; *Follower v. Laughlin*, 12 id. 105; *Diblee v. Mason*, 1 Code R. 37; S. C., 6 N. Y. Leg. Obs. 363. How far the court may correct a mistake in the name of a party has been discussed under *misnomer*. § 6, art. 2, *ante*, 473.

It is a general rule that mere errors in form can be amended on application to the court, and on such terms as are just. *Lane v. Beam*, 19 Barb. 51; S. C., 1 Abb. 65; Code, § 173. But the rule goes no further. The court cannot, by amendment of a process which was insufficient to confer jurisdiction, render such void process valid. In other words, jurisdictional defects cannot be cured by amendment. *Farnham v. Hildreth*, 32 Barb. 277; *Moulton v. de ma Carty*, 6 Rob. 470; *Hoffman v. Fish*, 18 Abb. 76; *Cole v. Hindson*, 6 Term R. 234; *Cook v. Farren*, 34 Barb. 95; S. C., 21 How. 286; 12 Abb. 359; *Hallett v. Richters*, 13 How. 43; *Kendall v. Washburn*, 14 id. 380. Neither can the court allow any amendment which will substantially change the nature of the plaintiff's claim. Code, § 173. Thus, a plaintiff cannot, by an amendment of the summons, change an action for a claim due to the plaintiff in a representative character to an action for a claim due him as an individual. *Blanchard v. Strait*, 8 How. 83. Nor can he, after commencing his action as an individual, change it into an action for a claim held by him in a representative character. *McMahon v. Allen*, 12 How. 39; S. C. affirmed, 3 Abb. 89; 1 Hilt. 103. Nor can a cause of action for a tort be changed to an action for a breach of contract. *Springstead v. Lawson*, 23 How. 302; 14 Abb. 328. See Wait's Code, 459 (p). See Names and Character of Parties, art. 2, § 4, *ante*, 469. But the court may amend the summons by inserting the name of the court, when omitted through inadvertence; or correct

Amending summons.

any other mistake if the defendant has not been misled or prejudiced thereby. *Tallman v. Hinman*, 10 How. 89. See Title, art. 2, § 2, *ante*, 468. Amendments are freely allowed where they become necessary from facts and circumstances unforeseen and unknown at the time of the commencement of the action. Thus, where new parties have been brought in by an amendment of the complaint, an amendment of the summons becomes a matter of necessity, and is granted on application to the court almost as of course. *Follower v. Laughlin*, 12 Abb. 105; *Walkenshaw v. Perzel*, 32 How. 310; S. C., 7 Rob. 606; 5 *id.* 648. So, where, since the commencement of an action for a single and entire demand, by the service of a summons demanding judgment for a specified sum, the plaintiff discovers that his cause of action is greater than he supposed, and entitles him to demand a larger sum, he may, on application to the court, amend his summons by inserting the sum to which he is entitled in the demand for judgment. *Deane v. O'Brien*, 13 Abb. 11. So, where a plaintiff has inadvertently framed his summons under the wrong subdivision of section 129 of the Code, he will be allowed to change the form of the notice of judgment, on terms. *Champlin v. Deitz*, 37 How. 214; *Willet v. Stewart*, 43 Barb. 98; *McDonald v. Walsh*, 5 Abb. 68. But where the plaintiff deliberately and intentionally frames his notice of judgment under the wrong subdivision, for the purpose of thereby gaining an unfair advantage over the defendant, the court will deny the privilege of amendment. *Lane v. Beam*, 19 Barb. 51; S. C., 1 Abb. 65. The subscription of the summons may be amended even after judgment. *Sluyter v. Smith*, 2 Bosw. 673. So, where the summons states that the complaint is annexed, when such is not the fact, the defect may be cured by amendment. *Keeler v. Belts*, 3 Code R. 183. The power to amend in respect to any irregularity in the form of a summons has been pointed out in connection with the discussion of the requisites of a summons in the preceding article. From the illustrations given it will be seen that nearly every possible defect in the form of a summons has been made the subject of amendment, and that the only limit to the power to amend is that discretionary power vested in the court for the protection of the rights of the adverse party. From the exercise of this discretionary power there is no appeal. *Tallman v. Hinman*, 10 How. 89. Except in cases of misnomer, where the objection must be taken by answer, all amendments to a summons must

Notice of no personal claim — Contents of the notice.

be obtained upon motion ; and, when the defendant has appeared generally in the action, it must be upon at least eight days' notice. Code, §§ 413, 414. But if the defendant has not appeared in the action the motion may be made *ex parte*. If the amendment is allowed, copies of the amended summons should be served on all the parties defendant, or their attorneys.

ARTICLE IV.

NOTICE OF NO PERSONAL CLAIM.

Section 1. When such notice is proper. In actions for partition, and for the foreclosure of mortgages on real estate, it frequently becomes necessary to serve process on defendants, against whom no personal claim is made, and who have no material rights to defend. In all such cases, where there are, usually, numerous defendants, many of whom would not embarrass the progress of the action by an appearance, if its object were understood at its commencement, a notice of no personal claim served with the summons will obviate the necessity of such appearance, and will also save the plaintiff the useless labor, otherwise obligatory, of serving notices of all subsequent proceedings on defendants who have no interests or rights to protect. This notice, though originally intended to be confined to the two classes of cases before mentioned, has by amendment been extended to all other actions.

The notice of no personal claim is proper wherever no reasonable defense can be interposed to the demands of the plaintiff, and where no rights or interests of the defendant would be invaded or jeopardized by the allowance of such demands. In no case can it be made a means of perpetrating a fraud, because, whenever it appears that a plaintiff seeks under this notice to deprive a defendant of a substantial right, the courts will declare all such proceedings void *ab initio*.

Section 2. Contents of the notice. The notice must be subscribed by the plaintiff or his attorney, and should set forth the general object of the action, giving a brief description of the property affected by it, if it affects specific real or personal property, and should notify the defendant that no personal claim is made against him. Code, § 131. It was the intention of the legislature, that this notice should contain, in a condensed form,

Notice of no personal claim — Costs if defendant unreasonably defend.

the substance of those long complaints which were formerly in use in suits in partition, or, for the foreclosure of mortgages. The notice is a substitute for the complaint, and renders service of a complaint unnecessary, unless, within the time for answering, the defendant makes a written demand for it. Code, § 131.

Notice of no Personal Claim.

(Title of Cause.)

To James Camp, one of the defendants above named :

SIR: Take notice that the object of this action, in which a summons is herewith served upon you, is (to foreclose a mortgage executed by and his wife, to on the day of , 18 , for the sum of dollars, with interest from , 18 , which mortgage was recorded in the office of , on the day of , 18 , in book No. of mortgages, page , upon the following described premises, *here describe the premises as in complaint.*)

No personal claim is made against you.

(Date.)

(Signature.)

Section 3. Costs if defendant unreasonably defend. It is optional with the plaintiff whether to serve the notice, or the complaint, or whether he will elect to omit the service of both. The notice is no part of the process for the commencement of the action, and is in no case essential to the cause. *Gallagher v. Egan*, 2 Sandf. 742. "But if a defendant on whom such notice is served unreasonably defend the action, he shall pay costs to the plaintiff." Code, § 131. If a defendant, on whom a summons has been served unaccompanied by a notice of this nature, should employ an attorney and demand a copy of the complaint, he could, undoubtedly, recover all taxable costs before notice of trial. But this clause which declares that, if the defendant unreasonably defend the action, he shall pay costs to the plaintiff, adds no new liability to such defense, as that rule previously existed in all equitable actions independent of the service of a notice of no personal claim. See *O'Hara v. Brophy*, 24 How. 379.

The service of this notice would, however, preclude all possibility of the recovery of costs by the defendant previous to the notice of trial. Where the complaint is served with the summons, it has the same effect as the service of the notice, and further service of such notice is unnecessary. *O'Hara v. Brophy*, 24 How. 383. It was formerly held that no fixed fees

Notice of pendency of action.

could be claimed for the service and return of this notice. See *Benedict v. Warriner*, 14 How. 568; *Gallagher v. Egan*, 2 Sandf. 742. But by the statute, in relation to the fees of sheriffs, it is provided that the sheriff shall be allowed for serving a summons, or summons and complaint, or summons and notice of object of action, or any other paper issued in an action, the sum of one dollar. Laws of 1871, ch. 415, as amended by Laws of 1872, ch. 26. Travel fees are also allowed. *Ib.*

ARTICLE V.

NOTICE OF PENDENCY OF ACTION.

Section 1. In what actions or cases proper. By the provisions of the 132d section of the Code, the plaintiff, in actions affecting the title to real estate, may secure a lien on the property which is the subject of litigation, by filing with the clerk of the county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the property affected thereby.

This notice is also proper whenever, under the provisions of the Code included between sections 227 and 244, a warrant of attachment has been issued, if the same is intended to affect real estate. Code, § 132. But the filing of a notice of *lis pendens* in an action against a non-resident *for the recovery of money*, and in which a warrant of attachment has been issued, is a nullity. *Burkhardt v. Sanford*, 7 How. 329.

In actions for the foreclosure of mortgages, the filing of this notice is an indispensable prerequisite to the obtaining of a judgment. The language of the statute, in this instance, unlike that employed in regard to the filing of this notice in other actions relating to real property, is imperative and not permissive. The terms used declare that such "notice *must* be filed," and the supreme court have added to the force of this mandate by requiring that the plaintiff, when he moves for judgment, shall show by affidavit, or the certificate of the clerk of the county where the mortgaged premises are situated, that a notice of the pendency of the action was filed as required by the Code. Rule 72, Supreme Court.

Notice, when and where to be filed.

Section 2. When and where to be filed. Prior to the passage of any statute, the pendency of an action in equity was, of itself, notice to all parties who had any interest in it or in the subject-matter of the controversy. By subsequent legislative enactments, the filing of a notice became necessary to the perfecting of a lien on property in litigation, and, since the adoption of the Code, the time of such filing has been repeatedly changed by amendments. Prior to 1851, the notice could be filed only at the time of commencing the action. By the amendment of that year this rule was changed, and the time of filing the notice was made dependent on the filing of the complaint; and by the amendment of 1862, providing that the action shall be deemed commenced for the purposes of the section, from the time of the filing of the notice, the intent of the legislature to make the time of the filing of the complaint the only restriction upon the time of filing a notice of *lis pendens* is established beyond doubt. *Stern v. O'Connell*, 35 N. Y. (8 Tiff.) 104. A notice of *lis pendens* filed before filing the complaint is not a nullity, but becomes effectual and operative only upon the subsequent filing of that pleading. *Benson v. Sayre*, 7 Abb. 472, note. And see *Waring v. Waring*, id. 472; *Burroughs v. Reiger*, 12 How. 171. As the complaint may be filed at any time before the service of the summons, the date of such filing could fix no limit to the time between the filing of the notice of *lis pendens*, and the actual commencement of the action. But the Code provides that the notice shall be a nullity unless followed by the first publication of the summons or an order therefor, or by the personal service thereof on a defendant within sixty days after such filing. Code, § 132. This provision limits the time of the filing of the notice to sixty days before the actual commencement of the action.

So the plaintiff may file the notice whenever a warrant of attachment has been *issued*, or at any time afterward, if *real estate* is sought to be charged thereby. Code, § 132. So a defendant, setting up an affirmative cause of action, and demanding substantive relief in an action affecting real estate, may file a notice of *lis pendens*, either with his answer or at any time afterward. But in an action for the foreclosure of a mortgage, the notice *must* be filed at least twenty days before judgment.

And in all cases, the notice must be filed with the clerk of

Contents of notice — Notice of pendency of action.

each county in which the property which is the subject of the action is situated. Code, § 132.

A notice so filed cannot be removed from the files of the court. *Pratt v. Hoag*, 12 How. 215 ; S. C., 5 Duer, 631. But the Code prescribes how the notice may be canceled of record, in case the action shall be settled, discontinued or abated. See § 7, *post*.

Section 3. Contents of notice. The notice of *lis pendens* must contain the names of the parties, the object of the action, and a description of the property in that county affected by it ; and in actions for the foreclosure of a mortgage, the notice must contain the date of the mortgage, the parties thereto, and the time and place of recording the same. Code, § 132.

Notice of Pendency of Action.

SUPREME COURT — COUNTY OF

A. B., plaintiff,
agst.

C. D. and E. F., defendants.

Notice is hereby given, that an action has been commenced and is now pending in this court, upon a complaint of the above-named *plaintiff* against the above-named *defendants*, for the foreclosure of a mortgage, bearing date the day of , one thousand eight hundred and , executed by to , and recorded in the office of the clerk of the county of , on the day of , one thousand eight hundred and , at o'clock in the noon, in Book No. of Mortgages, page ; that the mortgage was given to secure (state the condition of the mortgage), and that the mortgaged premises in the last-mentioned county, affected by the said foreclosure, were, at the time of the commencement of this action, and at the time of filing this notice, situated in the last-mentioned county, and are described in the said mortgage as follows, to wit: (Description of lands.)

(Date.)

(Signature.)

Index the names of all of the defendants.

(Or the defendants A. B., C. D.)

Y. Z.,
Plaintiff's Attorney.

Notice of Pendency of Action in Partition.

SUPREME COURT — COUNTY OF

A. B., plaintiff,
agst.

C. D., E. F. and G. H., defendants.

Notice is hereby given that an action has been commenced and is now pending in this court upon a complaint of the above-

Effect of filing the notice.

named *plaintiff* against the above-named *defendants*, for the purpose of obtaining a partition and division of the premises therein described, among the owners thereof, or a sale thereof, under the direction of this court, and for a division of the proceeds of such sale among such owners, according to their respective rights, and that the premises affected by the said action were, at the time of the commencement of this action, and at the time of filing this notice, situated in _____ county, and are described as follows, to wit: (Description of premises.)

(Date.)

(Signature.)

Index the names of all of the defendants.

(Or the defendants E. F., G. H.)

Y. Z.,

Plaintiff's Attorney.

Section 4. Effect of filing the notice. For the purpose of perfecting a lien upon land, an action is deemed commenced from the time of the filing of a notice of *lis pendens*, and from that time only is the pendency of the action constructive notice to a purchaser or incumbrancer of property affected thereby; and every person whose conveyance or incumbrance is subsequently executed, or subsequently recorded, will be deemed a subsequent purchaser and incumbrancer, and will be bound by all proceedings taken after the filing of such notice to the same extent as if he were made a party to the action. Code, § 132; *Stern v. O'Connell*, 35 N. Y. (8 Tiff.) 104; *Harrington v. Slade*, 22 Barb. 161.

Actual notice to a purchaser or incumbrancer has not become less effectual since the enactment of section 132 of the Code. *Griswold v. Miller*, 15 Barb. 520. The filing of a notice of *lis pendens* is merely a statutory substitute for actual notice to subsequent purchasers and incumbrancers of the existence of the plaintiff's claim, and that he has commenced an action to enforce it upon the lands. Whoever purchases such lands afterward buys with notice equivalent to actual knowledge of these facts. *Chapman v. West*, 17 N. Y. (3 Smith) 125; S. C., 10 How. 367; *Hall v. Nelson*, 14 id. 32; S. C., 23 Barb. 88. The defendant cannot so dispose of the property as to affect the plaintiff's rights therein. From the time of the filing of the notice the defendant is as effectually restrained from disposing of the property described therein as if prohibited from so doing by an injunction. *Stevenson v. Fayerweather*, 21 How. 449.

But the filing of the notice will be ineffectual and inoperative in all cases where the statute has not expressly provided for its

Affidavit of filing notice of pendency of action.

use. Where a warrant of attachment is issued in actions brought for the recovery of a demand against the property of a defendant generally, without any regard to the kind of property, or to any specified property, the plaintiff can obtain no lien upon the land of the defendant by filing a notice of *lis pendens*. The Code provides this security in actions brought to recover claims against specific real property only. *Buckhardt v. Sanford*, 7 How. 329; *People v. Connolly*, 8 Abb. 128.

Neither will the filing of a notice of the pendency of an action be effectual to create a lien on real property *not levied upon* by the sheriff under a warrant of attachment issued in an action affecting real property. The notice affects only those lands which the sheriff has actually attached, and is inoperative as to all other land that may be included therein. *Fitzgerald v. Blake*, 28 How. 110; S. C., 42 Barb. 513. And the fact must be kept clearly in view that this notice affects only parties to the action, and purchasers from them subsequent to the filing of the notice, and no act of the plaintiff in improperly inserting other names and filing the notice so framed, can have the effect of charging prior purchasers or incumbrancers not properly parties to the action. *People v. Connolly*, 8 Abb. 128; *Chapman v. West*, 17 N. Y. (3 Smith) 125; affirming S. C., 10 How. 367.

A party filing a notice of *lis pendens* in good faith, although in an improper case, cannot be made liable to an action for slander of title. Such an action can only be maintained on proof of malice. *Gibbs v. Pike*, 9 Mees. & Wels. 351; 9 Dowl. P. C. 131; 1 Dowl. N. S. 409.

Affidavit of Filing Notice of Pendency of Action.

SUPREME COURT—COUNTY OF

A. B., plaintiff,

agt.

C. D. and E. F., defendants.

STATE OF NEW YORK, COUNTY OF _____, ss.

_____, of the _____, of _____, being duly sworn, says, that he is _____ the attorney for the plaintiff in this action; that the same was brought to foreclose a mortgage. That a copy of the complaint herein, and a notice of the pendency of this action, in the form prescribed by section 132 of the Code of Procedure, containing the names of the parties thereto, the object of the action, the date of the said mortgage, and the parties thereto, the time and place of recording the same, the description of the mortgaged premises, and con-

Effect of omission to publish summons — Recording and indexing notice.

taining correctly and truly all the particulars required by law to be stated in such notice, was, on the day of , 187 , filed in the clerk's office of the county of , that being the county in which the mortgaged premises were and are situated ; and that, since the filing of the said notice, the complaint in this action has not been amended by making new parties to the action, or so as to affect other property not described in the original complaint, or so as to extend the claims of the plaintiff as against the mortgaged premises.

(Jurat.)

(Signature.)

Section 5. Effect of omission to publish summons. Although the Code provides that for the purposes of this section an action shall be deemed to be pending from the time of filing the notice, it is, however, further provided, that such notice shall be of no avail unless it shall be followed by the first publication of a summons on an order therefor, or by the personal service thereof on a defendant, within sixty days after such filing. § 132. It is plain from the language of the section that an omission to serve a summons in one of the modes prescribed would be fatal to any lien upon the real estate of the defendant, which otherwise would have been created by the notice. The filing of the complaint is presumptive evidence of the intent of the plaintiff to commence an action with all reasonable dispatch, and from that time a lien upon the defendant's land may be created by the filing of the notice. This evidence of good faith is sufficiently rebutted by the failure to take the first step toward acquiring jurisdiction over the person of the defendant, by the service of a summons, and the lien becomes a nullity after the expiration of sixty days from the filing of the notice, if the requirements of the statute have not been obeyed.

Section 6. Recording and indexing the notice. By the laws of 1864, chapter 53, the clerks of the several counties of this State are authorized and directed to record and make an index of all notices of pendency of action which may hereafter be filed in the office of such clerk, and on request of any person, and on payment of fees, to similarly record and index any similar notice that has been filed in his office. The party filing such notice is required to indicate at the foot of the notice the names of the defendants it shall be necessary to insert in the index. And it is further provided, that the record of any such notice, or a certified copy thereof, may be read in evidence in any of the courts

Removal of notice from record — New notice — Amendments.

of this State, with the like force and effect as if the original notice was produced.

The clerk is entitled to receive as fees ten cents per folio, in addition to the fees before allowed for filing, indexing and certifying such notices. See Laws of 1864, ch. 53; form of notice, *ante*, 496, 497.

Section 7. Removal of notice from record. Previous to the amendment of the Code in 1862, the court had no power to order a notice of *lis pendens*, properly filed, to be canceled or taken from the files of the court. *Pratt v. Hoag*, 12 How. 215; S. C., 5 Duer, 631. But by this amendment discretionary power is given to the court in which the action is commenced, to order the notice to be canceled of record, at any time after the settlement, discontinuance or abatement of the action. Code, § 132. See *Lyle v. Smith*, 13 How. 104.

This may be done on the application of the party aggrieved and for good cause shown and on such notice as shall be approved or directed by the court. Such cancellation must be effected by an indorsement to that effect on the margin of the record, referring to the order. Code, § 132.

Section 8. New notice when necessary. Where, after the filing of a notice of *lis pendens*, the complaint is amended by striking out or adding new parties, a new notice should be filed to conform to the complaint. *Curtis v. Hitchcock*, 10 Paige, 399; S. C., 2 N. Y. Leg. Obs. 363; *Clark v. Havens*, Clarke's Ch. 560, 563, note. In all cases of an amendment of the complaint it is the safer practice to file a new notice.

Section 9. Amendments of notice. A notice of *lis pendens* may be amended by inserting the description of a portion of the premises against which a lien is thereby sought to be created, when such description was omitted by mistake. *Vanderheyden v. Gary*, 38 How. 367. So, a notice may be amended by striking out portions descriptive of property not proper to be included in such notice. *Fitzgerald v. Blake*, 28 How. 110; S. C., 42 Barb. 513.

The provisions of section 173 of the Code apply to this notice.

Section 10. Substantial compliance with the Code. A substantial compliance with the requirements of the Code will be sufficient to render a notice of *lis pendens* valid and effectual. Thus, although the Code requires that the notice shall contain the names of the parties, the addition of one wrong initial

Actions, when deemed commenced.

between the christian and surname of a party will not have the effect of releasing a purchaser of the property described in the notice from the presumption of having a full knowledge of the pendency of an action in respect thereto. *Weber v. Fowler*, 11 How. 458. So a notice of *lis pendens* which gives the city and ward in which a mortgage is recorded, but omits to specify the county is, notwithstanding, a substantial compliance with the statute, and is sufficient in the absence of objection before judgment in the action. *Potter v. Rowland*, 8 N. Y. (4 Seld.) 448.

ARTICLE VI.

ACTIONS, WHEN DEEMED COMMENCED.

Section 1. In general. While an action cannot be considered as *technically* commenced before the service of a summons, yet, for the purpose of securing a limited and temporary jurisdiction over the property of the defendant until such service can be made, certain actions are deemed commenced from the allowance of a provisional remedy. Code, § 139.

The provisions of the sections of the Code hereafter enumerated, were not intended to conflict with the general principle laid down in section 127, but rather to provide a means of securing a temporary control of the defendant's property, until jurisdiction absolute can be acquired by the service of a summons. Thus, the Code provides that an action is commenced as to each defendant when the summons is served on him, or on a co-defendant, who is a joint contractor, or otherwise united in interest with him. And it further provides, that an attempt to commence an action is deemed equivalent to the commencement thereof within the meaning of the title relating to the time of commencing actions, when the summons is delivered, with the intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants or one of them usually or last resided; or, if a corporation be defendant, to the sheriff or other officer of the county in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business. Code, § 99. And yet the mere issuing of a summons under this provision of the Code is not the commencement of an action for general purposes, but is only so regarded when the cause of action would otherwise be barred by the stat-

Actions, when deemed commenced.

ute of limitations. See *Kerr v. Mount*, 28 N. Y. (1 Tiff.) 659; *Davis v. Duffie*, 8 Bosw. 617; *Wiggin v. Orser*, 5 Duer, 118. So the filing of a notice of *lis pendens* is deemed the commencement of an action affecting the title to real property, but is only so regarded for the purpose of fixing a time from which a purchaser will be charged with notice that the title to such property is in controversy; and from which each subsequent transfer will be held to have been made subject to the claims of the parties named in the notice. The validity and force of the notice itself is made dependent on the subsequent service of a summons. Code, § 132. In the same manner it is provided that for the purposes of the section of the Code authorizing the attachment of the property of foreign corporations, and of non-resident, concealed or absconding defendants, an action shall be deemed commenced when the summons is issued, provided, however, that personal service of such summons shall be made, or publication thereof commenced, within thirty days. Code, § 227. This provision was added to the Code by the amendment of 1866, in order to limit the force and effect of the first words of section 227, which had been construed as requiring that an action should be actually commenced by the service of a summons before a warrant of attachment could issue against a non-resident defendant. See *Kerr v. Mount*, 28 N. Y. (1 Tiff.) 659; *Corson v. Ball*, 47 Barb. 452. The proper construction of this amendment is, that in each particular case in which a warrant of attachment is properly issued, whether at the time of issuing the summons or afterward, the action shall be deemed to be provisionally or conditionally commenced and depending during the thirty days immediately succeeding the issuing of the summons. But, if within the thirty days the proviso or condition is not complied with, the action is no longer deemed to be commenced by the issuing of the summons, and the action is no longer depending. *Waffle v. Goble*, 35 How. 356; S. C., 53 Barb. 517.

In the cases mentioned in section 135 of the Code, an action is deemed commenced at the expiration of the time prescribed by the order for the publication of a summons. Code, § 137. It may be laid down as a general rule of construction, that in no case did the framers of the Code intend that an action should be commenced and carried to a final determination without the service of a summons in some of the modes provided therein; and wherever a section contains a modification of the general

Demand of complaint, when and how made — Notice of retainer.

rule in relation to the commencement of actions, the modification must be understood as extending to the purposes of that section only. *Kendall v. Washburn*, 14 How. 380; *In re Griswold*, 13 Barb. 412. Neither should a broad construction be given to the words "provisional remedy."

The approval of an undertaking by a sheriff in an action of replevin is not the allowance of a provisional remedy within the meaning of the Code. The remedies must be restricted to such as are allowed by the court. *Nosser v. Corwin*, 36 How. 540.

ARTICLE VII.

DEMAND OF COPY OF COMPLAINT FILED BUT NOT SERVED.

Section 1. Demand, when and how made. Where the summons is served without the complaint, the defendant may, at any time within twenty days from such service, cause a notice of appearance to be given, and in person, or by attorney, demand in writing a copy of the complaint, specifying a place within the State where it may be served. Code, § 130. No particular form is essential to this demand, nor can a general demand for "all the papers" in an action be deemed insufficient because of its omission to specify the complaint. *Ferris v. Soley*, 23 How. 422; *Walsh v. Kursheedt*, 8 Abb. 418.

Notice of Retainer.

SUPREME COURT.

A. B., plaintiff,	}
<i>agst.</i>	
C. D., defendant.	

SIR: Take notice that I have been retained by, and appear as attorney for, the defendant _____, in this action, and demand a copy of the complaint which may be served on me at my office in _____, N. Y. Dated _____, 187 .

G. K.,

*Attorney for Defendant.**To Y. Z., Plaintiff's Attorney.**Admission of Service of Notice.*

Personal service of a notice of which the above (or within) is a copy, is admitted this _____ day of _____, 187 .

Attorney for

Service of copy of complaint — Time of serving complaint — Enlarging time.

Section 2. Service of a copy of the complaint, in what cases necessary. The only case in which the Code expressly authorizes a defendant to demand a copy of the complaint, and gives him twenty days thereafter to answer it, is where there has been a personal service of the summons but no copy of the complaint has been served with it. *Mackay v. Laidlaw*, 13 How. 129. Under an order for the publication of a summons, a copy of the complaint may be mailed to the defendant, and in this case no further service can be demanded as a right, as the law presumes that the complaint was duly received by the defendant. *Id.*; *Downer v. Mellen*, 50 Barb. 232; and in no case is it obligatory upon the plaintiff to serve a complaint on a simple demand by the defendant, after the twenty days allowed by law for the making of such demand has expired. But the court may, in its discretion, and on such terms as may be just, order the plaintiff to serve a complaint after the time for demanding the same has expired. *Engs v. Overing*, 2 Code R. 79; *Bennett v. Dellicker*, 3 id. 117.

Section 3. Time of serving complaint. The Code provides that the plaintiff must serve a copy of the complaint upon the defendant within twenty days from demand. Code, § 130. But this rule does not require the plaintiff to wait for a formal demand. He may, at any time after the service of the summons, voluntarily serve the complaint. *Van Pelt v. Boyer*, 7 How. 325. When several demands are made at different times, but by the same attorney, representing separate defendants in the same action, the twenty days allowed for the service of each copy complaint runs from the date of the first demand. *Luce v. Tremper*, 9 How. 212. Except under an order enlarging the time for serving the complaint, service after twenty days from demand is a nullity. See § 6, *post*, 506.

Section 4. Enlarging time of service. Under the provisions of section 405 of the Code, the plaintiff may, upon an affidavit showing grounds therefor, obtain an order extending the time for serving a copy of the complaint. *Littlefield v. Murin*, 4 How. 306; S. C., 2 Code R. 128. If the time for serving the complaint has expired, this order can be obtained only on notice to the defendant; but if the application is made within the prescribed time, the order may be granted *ex parte*. *Stephens v. Moore*, 4 Sandf. 674. If no notice is required, the application may be made to a county judge, but in other cases to a judge

Time to answer after service of the complaint.

of the supreme court, if the action is pending in that court. Code, § 405; *Parmenter v. Roth*, 9 Abb. N. S. 385; *Rogers v. McElhone*, 12 Abb. 292; S. C., 20 How. 441; *Merritt v. Slocum*, 3 id. 309; S. C., 1 Code R. 68. In case the order is obtained, the affidavit used on the motion, or a copy of the same, must be served with a copy of the order, or the order may be disregarded. Code, § 405. • If the order is granted *ex parte* by a judge at chambers, it need not be entered with the clerk. *Savage v. Relyea*, 3 How. 276. The papers should be served in the same manner as other papers or orders in a suit. See Code, § 409.

Section 5. Time to answer after service of the complaint. As a general rule the defendant is allowed twenty days from the time of the personal service of the complaint, in which to serve his answer, and double the time is allowed when the complaint is served by mail. Code, §§ 130, 412.

By section 183 of the Code, the defendant is allowed twenty days after the service of an order of arrest, in which to serve an answer, instead of being required to answer in twenty days after the service of the summons.

Previous to the amendment of this section, a defendant was personally served with a summons, and within twenty days thereafter the plaintiff voluntarily served a copy of the complaint, and had the defendant arrested, from which he was discharged. No return of the service of the order of arrest, or of the complaint, was made, nor did the defendant appear in the action, or demand a copy of the complaint. At the end of twenty days from the service of the summons, the plaintiff entered judgment as for want of an answer. The defendant, after the entry of judgment, but within twenty days after the service of the complaint and order of arrest, moved to extend the time to answer, which motion was only granted on terms, and the entry of judgment was held to be regular. *Van Pelt v. Boyer*, 7 How. 325.

The time to answer may also be extended by an order for that purpose, or by the written stipulations of the attorneys, but not otherwise. *McGowan v. Leavenworth*, 2 E. D. Smith, 24; Code, § 405. See Rule 16, Supreme Court. But no order extending the time to answer will be granted unless the moving party presents to the justice or judge to whom the application is made, an affidavit of merits or proof that it has been filed, or an affidavit of the attorney or counsel retained to defend the action,

Effect of an omission to serve the complaint.

that, from the statement of the case in the action made to him by the defendant, he verily believes that the defendant has a good and substantial defense upon the merits to the cause of action set forth in the complaint or some part thereof. And the affidavit must also state whether any extension of time to answer has been granted by stipulation or order. Rule 30, Supreme Court.

Section 6. Effect of an omission to serve the complaint. If a copy of the complaint is not served within twenty days after the demand therefor, the defendant may move to dismiss the complaint, under section 274 of the Code. This will, in effect, be equivalent to a motion to dismiss the action. *Baker v. Curtis*, 7 How. 478. See Judgment for Failure to Proceed, *post*, p.

This right is confined to defendants served with a summons. Thus, where several defendants are named in the summons, and a part only are served, those only who have been served can appear and ask a dismissal of the complaint under section 274, unless they have some right to defend which renders such appearance necessary. *Tracy v. Reynolds*, 7 How. 327. A plaintiff has a right in such cases to serve a complaint upon those who have been served with a summons, and to omit service upon the others, and those served with a complaint cannot ask the court to dismiss the complaint in favor of the other defendants. *Travis v. Tobias*, 7 How. 90.

Serving a copy of the complaint after the time for such service has expired is in effect equivalent to not serving it at all. The defendant need not receive the complaint so served, and may safely disregard it. It should, however, be promptly returned to the plaintiff, or the defendant will be held to have waived the irregularity by retaining it beyond a reasonable time. *Baker v. Curtis*, 7 How. 478. See Rule 26, Supreme Court. This time has never been limited to a shorter period than the same day, or extended to one greater than six days. *McGowan v. Leavenworth*, 2 E. D. Smith, 24; *Knickerbacker v. Loucks*, 3 How. 64; *Hollister v. Livingston*, 9 id. 140; *Levi v. Jakeways*, 4 id. 126; S. C., 2 Code R. 29. But the defendant is under no obligation to return a complaint served after the service of a notice of motion to dismiss the complaint. *Baker v. Curtis*, 7 How. 478.

CHAPTER II.

SERVICE OF THE SUMMONS.

ARTICLE I.

THE SERVICE AND BY WHOM MADE.

Section 1. Service in general. In the previous chapter the essentials of a valid summons have been discussed at length. The remaining and most important consideration is the service of the summons when issued. Errors in the form of a summons may be corrected by amendment even after judgment; but no proceeding on the part of the plaintiff can remedy a jurisdictional defect arising from an insufficient service; and no delay to assert his rights, on the part of the defendant, will debar him from the privilege of setting aside, as void, such service and all the subsequent proceedings. It is not so essential to consider *by whom* a summons shall be served, as *how* such service shall be made. The summons may be served by the sheriff of the county where the defendant may be found, or by any other person not a party to the action. Code, § 183.

Section 2. Service by sheriff. The sheriff, as the executive officer of the court, is, theoretically, the person to whom a summons may most properly be delivered for service. Service of process is in the line of his official duty, and if he fail or neglect to perform such duty or make the proper return, the party aggrieved thereby may serve on him a notice to return such process within ten days, or show cause at a special term why an attachment should not issue against him. Rule 10, Supreme Court. *Wilson v. Wright*, 9 How. 459. His certificate of service is conclusive evidence as against all parties but the defendant; and his fees for service are fixed by statute, and can be taxed in the bill of costs as disbursements. *Van Rensselaer v. Chadwick*, 7 id. 297; *Case v. Price*, 9 Abb. 111; 2 R. S. (644) 663. When a summons is placed in the hands of the sheriff for service he is liable to the plaintiff for any damages sustained by him from any neglect to make such service or the proper return. 2 R. S. (440) 458; Code, §§ 133, 419; Rule 10, Supreme Court.

Service by a private person — Service by a coroner, when proper.

Ledyard v. Jones, 7 N. Y. (3 Seld.) 551. None of these advantages can be claimed when service is made by a private person. See next section.

But the sheriff can make such service in an official capacity, only within the county in which he was elected, and any act performed by him out of such territorial limits is the act of a private person. *Farmers' Loan and Trust Company v. Dickson*, 17 How. 477; S. C., 9 Abb. 61; *Thurston v. King*, 1 id. 126; *Morrell v. Kimball*, 4 id. 352.

In no case is the sheriff required to serve a summons unless his fees for such service are prepaid. *Wait v. Schoonmaker*, 15 How. 460. But if he serves them without requiring prepayment, he cannot retain them, and refuse to make a return, because his fees are not paid. *Ib.* As to the amount of such fees, see Laws of 1871, ch. 415, § 1, subd. 1; Laws of 1872, ch. 26.

Section 3. Service by a private person. The service of a summons by a private person, when properly made, is as valid and effective as a service by a sheriff. See *Mills v. Corbett*, 8 How. 500. The only distinctions made in respect to the service by persons in an official or a private capacity, relate to the character of the proof required, the right to a fixed compensation, and liability for negligence. A private person in making a service is required to know that the party served is the person mentioned and described in the summons as the defendant, and to carefully note the time, place and manner of the service. Rules 23, 24, Supreme Court.

A private person cannot claim as a right the fixed sum granted by law to an officer as a fee for the service of a summons. But he is entitled to a reasonable compensation, the amount of which must be determined by the clerk. *Case v. Price*, 9 Abb. 111; S. C., 17 How. 348; *Benedict v. Warriner*, 14 id. 568.

A constable is not regarded as an officer of a court of record for this purpose, and the service of a summons by him must be treated as a service by a private person.

Section 4. Service by a coroner, when proper. Whenever an action of replevin shall be brought by or against the sheriff of any county, the writ and all processes in the cause shall be awarded to and executed by the coroners of the county. 2 R. S. 551, Edm. Ed.; 3d R. S. (5th ed.) 849.

It is also provided, that whenever the sheriff of any county is a party in any suit, all process in such suit, except when other-

Service by elisors — How made.

wise provided by law, shall be executed by the coroner of the county. 2 R. S. 460, 461, Edm. Ed. ; 3 R. S. (5th ed.) 741.

It is also provided by the Code that, in actions in which the sheriff is a party, all the provisions of the Code relating to sheriffs shall apply to coroners. Code, § 419.

Section 5. Service by elisors. When both the sheriff and coroner are parties to the action or otherwise disqualified from serving a summons, the court may appoint two elisors to make the service. *Mayor, etc., of Berwick v. Williams*, 10 Moore, 266 ; and see *Jackson v. Rathbone*, 3 Cow. 296 ; *People v. Palmer*, 1 id. 32 ; *Anonymous*, 23 Wend. 102 ; *Mayor of Norwich v. Gill*, 8 Bing. 27.

ARTICLE II.

SERVICE, HOW MADE.

Section 1. Time of service and limiting time. Unless it is otherwise provided by the attorney subscribing the summons, there is no specified time within which a summons must be served. The Code simply requires that the summons shall be served and returned with all reasonable diligence. But, if the attorney subscribing the summons elects to fix a time for its service, he can, by an indorsement on the summons, require the sheriff to make the service at that time. Code, § 133. In case the sheriff should disregard this requirement, he may be required to make due service within ten days thereafter, under the provisions of rule 10 of the supreme court.

It is a general rule that a summons may be served on any day or at any hour of the day or night. *Priddee v. Cooper*, 1 Bing. 66 ; *Upton v. Mackenzie*, 1 Dowl. & R. 172 ; *Moss v. Powell*, 2 Burr. 813, note. To this rule there are several statutory exceptions. Thus, the service of a summons on Sunday is utterly void, and subjects the party making the service to damages at the suit of the party aggrieved. 1 R. S. 628; Edm. Ed., § 69 ; *Field v. Park*, 20 Johns. 140 ; *Van Vechten v. Paddock*, 12 Johns. 178 ; *Hastings v. Farmer*, 4 N. Y. (4 Comst.) 293. So the service of a summons upon an elector on an election day, in any city or town where he is entitled to vote, is prohibited by statute. 1 R. S. 116 Edm. Ed., § 4 ; *Hastings v. Farmer*, 4 N. Y. (4 Comst.) 293 ; *Weeks v. Noxon*, 11 How. 189 ; S. C., 1 Abb. 280. So formerly

Place of service—Mode of personal service, and upon whom made.

no summons could be legally served on Saturday, on a person who keeps that day as the Sabbath (Laws of 1839, ch. 367); this law has however been repealed, and the prohibition confined to process issuing out of a justice's court. *Marks v. Wilson*, 11 Abb. 87; Laws of 1847, ch. 349.

Service of a summons on any day prohibited by statute is void, and has no effect as the commencement of an action. *Hastings v. Farmer*, 4 N. Y. (4 Comst.) 293. But in the absence of any statutory restrictions, the service of a summons upon any day will be valid.

Section 2. Place of service. With the exception of the cases specified in section 135 of the Code, the service of a summons must be made within the territorial jurisdiction of the court from which it issues. *Litchfield v. Burwell*, 5 How. 341; *Fiske v. Anderson*, 33 Barb. 71; S. C., 12 Abb. 8.

By the provisions of section 133 of the Code, the summons may be served by the sheriff of the county where the defendant may be found, or by any other person not a party to the action.

The rule requiring such service to be made within the territorial limits of the general jurisdiction of the court is not without exceptions. Where the cause of action is one of those specified in sections 123, 124 of the Code, the superior court, and the court of common pleas of the city of New York have jurisdiction. Code, § 33, subd. 1. In actions of that character, the summons may be served upon the defendants in any county of this State. *Porter v. Lord*, 4 Abb. 43; 4 Duer, 682; 13 How. 254. So when all of the defendants reside in that city, or when one of several defendants jointly liable on a contract, resides there, these courts have jurisdiction, and the summons may be served anywhere in this State. *Ib.* *Bates v. Reynolds*, 7 Bosw. 685. In other cases the defendants must all reside in that city, or they must be personally served with process within the city, or the court will not have jurisdiction. *Ib.* Code, § 33; *Zeregal v. Benoit*, 33 How. 129; 7 Rob. 199.

Section 3. Mode of personal service in general, and upon whom made. Personal service of a summons may be made upon persons, or upon foreign or domestic corporations. Code, § 134. When it is sought to bring an action against persons, personal service of a summons may be made by delivering the summons to the defendant, and leaving it with him. *Beekman v. Cutler*, 2 Code R. 51.

Mode of personal service, and upon whom made.

If the defendant refuses to receive or retain the summons presented to him, the party making the service should, notwithstanding, leave a copy with him, at the same time informing him of its contents, and of his right to retain the copy tendered him. *Beekman v. Cutler*, 2 Code R. 51; Rule 23, Supreme Court; *Bell v. Vincent*, 7 Dowl. & Ryl. 233.

The delivery must be made by the person authorized to make the service, and the party receiving the summons must be the defendant in the action. Delivery to the wrong person is never equivalent to a personal service, although the party receiving it may hand it to the person for whom it was intended. *Williams v. Van Valkenburgh*, 16 How. 144; *Goggs v. Lord Huntingtower*, 12 Mees. & Wels. 503; S. C., 1 D. & L. 599.

The office of a summons is to give the defendant a certain and fair notice that an action has been commenced, and also to notify him of that reasonable time which the statute has given as an opportunity for the preparation of a defense, and any trick or device which deprives the defendant of these provisions for his protection is a fraud upon the statute, which will not be tolerated by the courts, although the letter of the statute has not been violated. *Bulkley v. Bulkley*, 6 Abb. 307; *Carpenter v. Spooner*, 2 Sandf. 717; S. C., 2 Code R. 140; *Goupil v. Simonson*, 3 Abb. 474. Thus where a summons, sealed up in a tin box, was served upon a defendant leaving the State for California, the summons, and all proceedings under it, were set aside as fraudulent and void. *Bulkley v. Bulkley*, 6 Abb. 307. So where a defendant has been brought within the jurisdiction of the court by means of fraudulent representations, for the purpose of making personal service of a summons upon him, the court will set aside the service. *Carpenter v. Spooner*, 2 Sandf. 717; S. C., 2 Code R. 140; *Metcalf v. Clark*, 41 Barb. 45; and see *Goupil v. Simonson*, 3 Abb. 474; *Benninghoff v. Oswell*, 37 How. 235; *Wells v. Gurney*, 8 Barn. & Cress. 769; and in general, personal service, procured through fraud, is invalid. *Ib.*

In actions against husband and wife, where no attempt is made to charge the wife's separate estate, service upon the husband is service upon both. *Eckerson v. Vollmer*, 11 How. 42; *Foot v. Lathrop*, 53 Barb. 183. See S. C., 41 N. Y. (2 Hand) 358; *Beaucombe v. Love*, Barnes, 406, 412.

The copy of the summons left with the defendant should be an exact counterpart of the original, but a trifling omission of a

Service on corporations.

word or letter, not altering the sound sense or meaning of the process, will not make the service irregular. *Sutton v. Burgess*, 1 C. M. & R. 770; 3 Dowl. P. C. 489; 5 Tyrw. 320; 1 Gale's Exch. 17, and see *Van Wyck v. Hardy*, 39 How. 392; affirming S. C., 20 id. 222.

Section 4. Service on corporations. The Code provides that in actions against corporations the summons may be served by delivering a copy to the president, secretary, cashier, treasurer, a director, or managing agent of the corporation; but it further provides, that such service can be made in respect to a foreign corporation only when it has property within this State, or the cause of action arose therein, or where personal service is made within the State upon the president, treasurer or secretary. Code, § 134.

The managing agent upon whom the summons may be served must be one whose agency extends to all the transactions of the corporation; one who has, or is engaged in the management of the corporation, in distinction from the management of a particular branch or department of the business. *Brewster v. The Michigan Central Railroad Company*, 5 How. 183; S. C., 3 Code R. 215. This does not authorize the service of a summons on a railroad corporation in the person of its baggage-master, or its general ticket and passenger agent. *Flynn v. Hudson River Railroad Company*, 6 How. 308; S. C., 10 N. Y. Leg. Obs. 158; *Doty v. Michigan Central Railroad Company*, 8 Abb. 427.

It is provided by statute that any life or health insurance company doing business in this State shall appoint an attorney within the State on whom process of law can be served, and that such attorney shall file with the superintendent of the insurance department his certificate of appointment, and the service of process upon him shall be deemed a valid personal service upon such corporation. Laws of 1853, ch. 463, § 14; id. ch. 551, § 2, as amended by Laws of 1862, ch. 300, § 4. By the laws of 1855 similar provisions were made in regard to insurance and other corporations created by the laws of other States, and doing business within this State. This act requires that a person shall be designated in every county in which such corporation transacts business on whom process may be served, and declares that such service shall be valid when duly made. It further provides, that if such person shall not be designated, it shall be lawful to serve such process on any person who can

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be found within the State acting as agent of said corporation or doing business for them. A summons is included in the general term "process." Laws of 1855, ch. 279, §§ 1, 2, 3, 4.

This act does not confer upon the court any jurisdiction which it did not formerly possess, but merely increases the facilities for the service of a summons against a foreign corporation in the cases allowed by section 134 of the Code, and of which the court has jurisdiction under section 427 of the same act. *Cumberland Coal Company v. Sherman*, 8 Abb. 243; S. C., 30 Barb. 159; 20 How. 62.

Where two parties make adverse claim to be the officers of the same corporation, the service should be made on the officers in possession and acting in an official capacity. *Berrian v. Methodist Society in New York*, 4 Abb. 424; S. C., 6 Duer, 682.

It will be noticed that, independently of the provisions of the act of 1855, the right to serve a summons upon any officer other than the president, treasurer or secretary of a foreign corporation depends upon the fact (1) that such corporation owns property within this State, or (2) that the cause of action arose therein. Code, § 134. It may be laid down as a general rule that a cause of action on contract arises within a State when such State is designated in the contract as the place where such contract is to be executed, as it is the place of the performance and not of the making of a contract that determines where the cause of action arises. *Burckle v. Eckhart*, 3 N. Y. (3 Comst.) 132; *Cumberland Coal Company v. Sherman*, 8 Abb. 243; S. C., 30 Barb. 159; 20 How. 62; *Campbell v. Champlain Railroad*, 18 id. 412; *Bank of Commerce v. Washington and Rutland Railroad Company*, 10 id. 1; *Connecticut Mutual Insurance Company v. Cleveland Railroad Company*, 23 id. 180; S. C., 26 id. 226; 41 Barb. 9. But in order to bring the right of service within the other requirements of the Code, the property owned within the State must be such as would be liable to attachment under sections 227, 242 of the Code. The right of property in the corporation must be present and absolute, and not contingent upon the happening of some future event. *Bates v. New Orleans, Jackson and Great Northern Railroad Company*, 4 Abb. 72; S. C., 13 How. 516. See *Jones v. Bradner*, 10 Barb. 193; *Buckmaster v. Smith*, 22 Vt. 203.

The person upon whom a summons may be served in an action against municipal corporations, is usually regulated by the act of

Service on minors under fourteen years.

incorporation, or by general or special statutes. Thus, in all actions against the city of New York, the summons must be served either upon the mayor, comptroller, or the counsel of the corporation. Laws of 1860, ch. 379, § 4. This question will be further discussed in a subsequent section. See § 7, *post*.

Section 5. Service on minors under fourteen years. Service must be made upon a minor, under fourteen years of age, by delivering a copy of the summons to the minor personally, and also to his father, mother or guardian, or, if there be none within the State, then to any person having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed. Code, § 134, subd. 2. But if the minor be of the age of fourteen years or upward, service may be made by delivering the copy of the summons to him personally, in the same manner as if he were an adult. Code, § 134, subd. 4.

Section 6. Service on lunatics, drunkards, etc. In an action against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs, in consequence of habitual drunkenness, and for whom a committee has been appointed, the summons must be served by delivering a copy to such committee, and to the defendant personally. Code, § 134, subd. 3. But in case no committee has been appointed, the service must be upon the defendant personally, as in case of service upon persons of sound mind. Code, § 134, subd. 4.

The service of a summons upon one with whom a person of unsound mind resides is not good service. *Heller v. Heller*, 6 How. 194; S. C., 1 Code R. N. S. 309. In partition suits, where a summons has been served on a part of the defendants, and a guardian *ad litem* appointed for an infant lunatic, on the application of his guardian or committee, personal service on such infant lunatic need not be made. *Rogers v. McLean*, 11 Abb. 440; S. C. affirmed, 34 N. Y. (7 Tiff.) 536; 31 How. 279; reversing S. C., 10 Abb. 306; 31 Barb. 304. See *Jelly v. Elliott*, 1 Cart. (Ind.) 119.

These provisions of the Code, as to the manner of the service of a summons on persons of unsound mind, must not be construed to dispense with the necessity of obtaining leave to sue before commencing actions against such persons. *Soverhill v. Dickson*, 5 How. 109; S. C., 3 Code R. 162; *ante*, 201, 202.

Section 7. Service on States, counties, towns, and public officers thereof. In an action against a State, the summons should be

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served on the governor, or chief executive magistrate, and on the attorney-general of the State. *Chisholm, executor, v. Georgia*, 2 Dall. 419. In actions against a county, or the board of supervisors of a county, the service should be made on the chairman or clerk of the board. 1 R. S. 384 (357), Edm. ed. In an action against a town, the summons should be served on the supervisor of the town. 1 R. S. 357 (329), Edm. ed. Service may be made on a city by serving a summons on its mayor. In the charters of nearly all municipal corporations, provisions are made for the service of process upon the corporation. Service of a summons on the city of New York must be made by service on either the mayor, comptroller, or counsel to the corporation. Laws of 1860, ch. 379, § 4.

Section 8. Service on imprisoned persons. In actions against imprisoned persons, the summons must be served on the defendant personally in the place of his confinement; and although the right of prosecuting an action is denied to such persons, the liability to be sued still exists. *Davis v. Duffie*, 8 Bosw. 617; S. C. affirmed, 3 Keyes, 606; 3 Trans App. 54, 4 Abb. N. S. 478; reversing S. C., 18 Abb. 380; *Morris v. Walsh*, 14 id. 387; S. C., 9 Bosw. 636.

Section 9. Temporary exemptions from service. Every defendant is exempt from the service of a summons on Sunday, or on an election day, in a town or city where he is entitled to vote. *Field v. Park*, 20 Johns. 140; *Pulling v. The People*, 8 Barb. 384; *Meeks v. Noxon*, 1 Abb. 280; S. C., *sub nom.* *Weeks v. Noxon*, 11 How. 189; *Hastings v. Farmer*, 4 N. Y. (4 Comst.) 293; *Bierce v. Smith*, 2 Abb. 411. So, also, no valid service of a summons can be made on any elector, in a town, and on a day in which a town-meeting is being held, at which he is entitled to vote. 1 R. S. 342 (315), § 10, Edm. ed.

A non-resident witness, or a party to an action residing in another State, is exempt from the service of a summons, when temporarily within this State for the sole purpose of being examined as a witness in an action being or to be tried here. The exemption continues while such witness is attending the court, or coming to, or returning from, the place of trial. *Merrill v. George*, 23 How. 331; *Seaver v. Robinson*, 3 Duer, 622; S. C., 12 N. Y. Leg. Obs. 120; and see Time of Service, § 1, *ante*, 509, *service on a part of the defendants*. Provisions have been made in the Code for the service of a summons, and for the subsequent

 Fees for service — Service by publication.

proceedings in an action against defendants jointly indebted upon a contract. §§136, 375 to 381. A full discussion of the practice and procedure in such cases will be found in its appropriate chapter in a subsequent part of this work. See Revival of Judgment against Joint Debtors.

Section 10. Fees for service. A sheriff is allowed by statute, as a fee for serving a summons, or summons and complaint, or summons and object of action, or any other paper issued in an action, the sum of \$1.00. He is also allowed for necessary travel in making such service, the sum of six cents per mile to and from the place of service, to be computed in all cases from the court-house of the county, and if there are two or more court-houses, to be computed from that nearest to the place of service. These statutory fees are allowed to the sheriffs of all the counties in the State, except the counties of New York, Kings and Westchester. Laws of 1871, ch. 415; Laws of 1872, ch. 26. The sheriff is entitled to his fee of \$1.00 for every defendant served. He is also entitled to his fee for going and returning. But this fee applies only to the process itself, and not to the number of defendants named, or who may be served. But one travel fee can be charged on the same process. See *Benedict v. Warriner*, 14 How. 568. The sheriff may demand these fees in advance, as a condition of making the service. *Wait v. Schoonmaker*, 15 id. 460. Fees for the service of a summons are not taxable, unless the service was made by the sheriff, in which case they may be taxed in the bill of costs as sheriff's fees. *Whipple v. Williams*, 4 id. 28; *Union India Rubber Co. v. Babcock*, 4 Duer, 620; S. C., 1 Abb. 262. If services which the sheriff may perform are performed by private persons, nothing more can properly be charged or allowed in the bill of costs than a reasonable compensation for the services rendered. Nothing can be allowed for constructive traveling or other services, in such cases. *Case v. Price*, 17 How. 348; S. C., 9 Abb. 111.

ARTICLE III.

SERVICE BY PUBLICATION.

Section 1. When such service is proper. It is a well-settled principle of law that jurisdiction of the person of a defendant cannot be obtained by any court, except by his voluntary

Service by publication.

appearance, or by due service of process. It is equally well settled that, prior to the Code, no effectual service of process could be made on any person beyond the jurisdiction of the court out of which the process issued. *Fenton v. Garlick*, 8 Johns. 194; *Anderson v. Heriot*, 4 Cow. 508, 524, note; *Fiske v. Anderson*, 12 Abb. 8; S. C., 33 Barb. 71; *Peck v. Cook*, 41 id. 549. But by section 135 of the Code, the publication of a summons and service by mail in pursuance of an order duly obtained from a judge of the court, was made equivalent to personal service. This provision of the Code was an innovation upon the former practice, and is limited to the cases expressly provided for by the statute. *Fiske v. Anderson*, 12 Abb. 8; S. C., 33 Barb. 71; *Peck v. Cook*, 41 id. 549; *Hallett v. Righters*, 13 How. 43.

It is provided by the section of the Code referred to, that whenever it shall appear by affidavit, to the satisfaction of the court or a judge thereof, or a county judge of the county where the trial is to be had, that the person on whom the service of a summons is to be made cannot, after due diligence, be found within the State, and that a cause of action exists against him, or that he is a proper party to an action relating to real property in this State, such court or judge may grant an order that the service be made by the publication of a summons in either of the following cases :

1. Where the defendant is a foreign corporation, has property within the State ; or, the cause of action arose therein ;

2. Where the defendant, being a resident of this State, has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent ;

3. Where he is not a resident of this State, but has property therein, and the court has jurisdiction of the subject of the action ;

4. Where the subject of the action is real or personal property in this State, and the defendant has or claims a lien or interest, actual or contingent therein, or the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein ;

5. Where the action is for divorce, in the cases prescribed by law. Code, § 135.

Unknown defendants having a lien upon, or an interest in, mortgaged premises, and whose residence cannot with reasonable

The affidavit to authorize the order.

diligence be found, were, in actions for the foreclosure of mortgages on real estate, included among those subject to the service of a summons under an order for publication, by the amendment of 1860.

Non-resident stockholders, and the personal representatives of deceased stockholders, of insolvent corporations and joint-stock companies, were also added to the class of defendants, included within the provisions of this section, by the act of 1869. Laws of 1869, ch. 157.

The property mentioned in subdivisions 1 and 3 of section 135 of the Code is not property temporarily within the State, and of which, from the nature of the case, there can be no agent or factor or other person in charge, through whom notice of the proceedings could reach the owner. *Haight v. Husted*, 4 Abb. 348, 351; S. C. affirmed, 5 id. 170; *Bates v. New Orleans R. R.*, 4 id. 72; S. C., 13 How. 516. On the contrary, the property must be such as is liable to attachment under section 227 of the Code. *Ib.* The importance of this fact will be more clearly understood, on referring to rule 34 of the supreme court, which provides that in actions for the recovery of money only, when the summons has been served by publication under section 135 of the Code, no judgment shall be entered, unless the plaintiff, at the time of making the application, shall show by affidavit that an attachment has been issued in the action and levied upon property belonging to the defendant.

Section 2. The affidavit to authorize the order. The proof requisite to authorize an order for publication must be made by affidavit, and by affidavit only. The return of a sheriff is not sufficient proof of the existence of facts upon which an order may properly issue, nor can these facts be made to appear partly by affidavit and partly by return. *Waffle v. Goble*, 35 How. 356; S. C., 53 Barb. 517. The affidavit may be made by any person having knowledge of the requisite facts. *Ib.*

Upon every application for an order that the service of a summons may be made by publication, the applicant must not only show that the case falls within some one of the subdivisions of section 135 of the Code, but he must also establish the central jurisdictional fact that the person on whom the service of the summons is to be made, cannot, after due diligence, be found within the State. The fact of non-residence is of no importance, except as it tends to establish the fact that he is not within the

The affidavit to authorize the order.

State at the time when the application is made. *Peck v. Cook*, 41 Barb. 549; *Van Wyck v. Hardy*, 39 How. 392. It must also appear that a cause of action exists against the defendant, in respect to whom the service is to be made. *Towsley v. McDonald*, 32 Barb. 604; *Rawdon v. Corbin*, 3 How. 416; S. C., 2 Code R. 3. Or where this is not strictly true, the other essential fact must be alleged, viz.: that defendant is a proper party to an action relating to real property in this State. Code, § 135.

The affidavit, after establishing these essential facts, without which the court has no jurisdiction to act, must set forth the other facts necessary to bring the case within some one of the subdivisions of section 135.

Thus, where an order is sought in a case falling under subdivision 1 or 3, the fact must exist and must be clearly established by affidavit that the defendant has property within this State. *Fiske v. Anderson*, 33 Barb. 71; S. C., 12 Abb. 8; *Evertson v. Thomas*, 5 How. 45; S. C., 3 Code R. 74.

If the case falls under subdivision 2, the affidavit should show positively and directly, and not from information and belief, that the defendant is a resident of this State, and that he has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed with like intent. *Towsley v. McDonald*, 32 Barb. 604; *Warren v. Tiffany*, 9 Abb. 66; S. C., 17 How. 106. In the same manner, the facts necessary to bring the case within any of the other subdivisions of section 135 of the Code should be set forth in the affidavit.

In general, the affidavit upon which an order for the publication of a summons is based should contain allegations of facts stated, with enough of circumstance and detail to establish beyond doubt that the order may properly issue. A positive statement of facts is always required when such statement can be obtained, but, when it becomes necessary to swear to facts on information and belief, the source of such information, and the grounds for such belief should invariably be given. It may not be indispensable that these facts should be so stated, but no order ought to be made without proof of that character, and it is certainly hazardous to attempt to procure an order on an affidavit in which such allegations are not made. *Van Wyck v. Hardy*, 39 How. 392; affirming S. C., 20 id. 222; *Peck v. Cook*, 41 Barb. 549; *Evertson v. Thomas*, 5 How. 45; S. C., 3 Code R.

Affidavit where defendant is a foreign corporation.

74. The allegations should not consist in a repetition of the bare words of the statute, but should combine with them matters of evidence, of which the words of the statute form the legal conclusion.

It is essential that these affidavits should be drawn with great care, in order that they may afford *prima facie* evidence of the jurisdiction of the court in granting the order, even though the jurisdiction of the court depends not upon the sufficiency of the affidavit as a means of satisfying the judge that certain facts exist, but upon the actual existence of the fact itself. *Fiske v. Anderson*, 33 Barb. 76; S. C., 12 Abb. 8; *Evertson v. Thomas*, 5 How. 45; S. C., 12 Abb. 8. A jurisdictional defect may at any time be raised by the defendant. *Ib.*; *Titus v. Relyea*, 16 How. 371; S. C., 8 Abb. 177. But if the facts set forth in the affidavit establish *prima facie* evidence of jurisdiction, the court of appeals will not review the decision of the court granting the order. *Van Wyck v. Hardy*, 39 How. 392; *Skinnion v. Kelley*, 18 N. Y. (4 Smith) 355; *Kissock v. Grant*, 34 Barb. 144. If the affidavit upon which the order for publication is based is insufficient, personal service of the summons and complaint on the defendant out of the State will not render the subsequent proceedings valid. *Peck v. Cook*, 41 Barb. 549.

Affidavit where Defendant is a Foreign Corporation.

(Title of cause.)

(Venue.)

A. B., plaintiff above named, being duly sworn, says:

I. That a cause of action exists in his favor against the defendants above named, the grounds of which are as follows: (State the cause of action, or, where the application is made at special term say, the grounds of which appear by the sworn complaint in this action, hereto annexed, the statements contained in which are true to the knowledge of the deponent.)

II. That the defendants are a foreign corporation, created under the laws of the State of _____, having their place of business in _____ in that State, and no officer or agent of said defendants upon whom service of summons can by law be made can, after due diligence and inquiry, be found within this State, although the deponent has made inquiry (state fully all the facts and circumstances showing what measures have been taken, what acts of diligence have been used, and particularly what inquiries have been made, and of whom, and the means of knowledge possessed by such persons in relation to the practicability of a personal service on them in this State).

Affidavit where defendant has departed from the State to defraud creditors, etc.

III. That the president of said corporation (*or other officer proposed to be served by mail*) is M. N., who resides at _____.

IV. That the defendants have property within this State, at _____, consisting of (*describe the property*).

V. That the cause of action against said defendants arose in this State, as appears by the foregoing statements (*or the annexed complaint*).

(*Jurat.*)

(*Signature.*)

Affidavit where defendant has departed from the State to defraud creditors or avoid service.

(*As in preceding form to II.*)

II. That the defendant is a resident of this State, to wit, of (*specify his particular place of residence*), but cannot after due diligence be found within the State. That a summons in this action has been made out, a copy of which is hereunto annexed, and due diligence has been made to effect its service. (*State all the facts and circumstances of the attempted service*); *or annex or refer to return of officer or affidavit of other person attempting to make service.*

III. That, as this deponent believes, the defendant has departed from this State to _____, in the State of _____, with intent to defraud his creditors, or with intent to avoid the service of summons, and the grounds of his belief are as follows (*set forth fully the facts and circumstances which form the ground of the belief in the fraudulent intent*).

(*Jurat.*)

(*Signature.*)

Affidavit where defendant is a non-resident.

(*Title of the cause.*)

(*Venue.*)

A. B., plaintiff above named, being duly sworn says :

I. That a cause of action exists in his favor against the defendant above named, the grounds of which are as follows (*state the facts constituting the cause of action, or refer to the complaint as annexed, as in preceding forms*).

II. That the defendant is not a resident of this State, but resides in the (city) of _____, in the State of _____, as deponent is informed by _____ (*state the name of the informant, and also the means or sources of knowledge in respect to such evidence possessed by him ; or if the residence of the defendant is unknown*). That the defendant is not a resident of this State, as the deponent is informed and believes ; and that the defendant cannot, after due diligence and inquiry, be found within this State ; that (*state what measures have been taken, and what acts of diligence have been used, and particularly what inquiries have been made, and of whom, and the means of*

Affidavit where defendant is absent and a proper party to an action.

knowledge possessed by such persons, in relation to the residence of the defendant and of the practicability of a personal service on him in this State.)

III. That the said defendant has property in this State, as this deponent is informed and believes, to wit: *(describe the property and the deponent's means of knowledge as to the ownership of the same.)*

(Jurat.)

(Signature.)

Affidavit where Defendant is absent and a proper party to an action relating to Specific Property.

(Title of cause.)

(Venue.)

A. B., plaintiff above named, being duly sworn says:

I. That this action is brought to foreclose a mortgage made on the day of , by the above-named defendant Y. Z., to this plaintiff to secure his bond of even date, conditioned for the payment of dollars, on certain real property in this State, consisting of , situated in the , county of .

II. That the defendant S. T. has, or claims to have, some lien or interest in said , which accrued subsequent to said mortgage; and that a part of the relief which this plaintiff demands in this action is to exclude said defendant from any lien or interest in said property, and that the said defendant S. T. is therefore, as he is advised, a proper party to this action.

III. That the said S. T. cannot, after due diligence, be found within this State. *(State as in previous form facts supporting the allegation.)*

(Jurat.)

(Signature.)

Affidavit where the action is for divorce.

(Title of cause.)

(Venue.)

A. B., plaintiff above named, being duly sworn says:

I. That this action is brought for divorce in one of the cases prescribed by law, and that a cause of action therefor exists in her favor against the defendant above named, the grounds of which are as follows: *(here state the facts constituting the cause of action, showing that the cause of action is within the statute relating to divorces, or state as follows:)* the grounds of which appear by the sworn complaint in this action hereto annexed, the statements contained in which are true.

II. That the defendant cannot be found within this State, although diligent effort to find him and serve upon him the summons herein has been made *(state facts fully in support of this allegation).*

III. That *(state defendant's residence if known, and, if unknown, state that fact).*

(Jurat.)

(Signature.)

The order of publication.

Section 3. The order. The order for the publication of a summons may be made by the court on an *ex parte* motion, or it may be made at chambers by a judge of the court, or by a judge of the county in which the action is triable. See Code, § 135. When the order is allowed by a judge at chambers, the caption should be omitted, and the order either indorsed on the affidavit or drawn up separately under the title of the cause, and signed by the judge at the foot. It is to be presumed from the fact of making the order of publication, that the affidavits therein recited afforded satisfactory evidence to the judge of the facts requisite to warrant its allowance, and an omission so to state in the order does not affect its validity. *Barnard v. Heydrick*, 49 Barb. 62; S. C., 2 Abb. N. S. 47; 32 How. 97. But, for the purpose of making the order show *prima facie* that the affidavit furnished satisfactory evidence of these facts, it is better to insert in the order such statement. See *Fiske v. Anderson*, 33 Barb. 71; S. C., 12 Abb. 8. The order must direct that publication of the summons shall be made in two newspapers designated in the order as most likely to give notice to the persons to be served, and for such length of time as may be deemed reasonable, but not less than once a week for six weeks. Code, § 135. It should also direct that a copy of the summons and complaint be forthwith deposited in the post-office, and directed to the defendant at his place of residence, naming it if known. If the order does not contain this direction it will be fatally defective. The word "*forthwith*" is also essential to the regularity and sufficiency of the order. *Hyatt v. Wagenright*, 18 How. 248; *Warren v. Tiffany*, 9 Abb. 66; S. C., 17 How. 106; *Towsley v. McDonald*, 32 Barb. 604; *Mosier v. Waful*, 56 id. 80.

The order should in some manner identify the summons, as by either reciting its contents or referring to it as annexed. *Rawdon v. Corbin*, 3 How. 416; 2 Code R. 3.

The order is usually drawn up by the plaintiff's attorney, who also inserts the names of the papers in which the summons is to be published, and, unless otherwise directed by the court, fixes the time of publication. This time is usually limited to six weeks, as the statute does not expressly require a longer publication.

In actions for the foreclosure of mortgages on real property, where it appears that unknown parties have an interest in or lien upon the mortgaged premises, the Code requires that the

Order for publication of summons, where defendant is a foreign corporation.

order shall direct the publication of the summons to such unknown defendants to be made in the State paper, as well as in a paper published where the mortgaged premises are situated. Code, § 135.

Order for the Publication of a Summons, where the Defendant is a Foreign Corporation.

(Title of cause.)

(Caption.)

It appearing to the satisfaction of the court, by the annexed affidavit (and complaint) that the defendants are a foreign corporation, and that a cause of action exists against them in favor of the above-named plaintiff; that the defendants have property within this State (or that the cause of action arose within this State), and that no officer (or agent) of the defendant can with due diligence be found within the State, on whom service of process can be made according to law; and that the president (or other officer) of said corporation is , and resides at , on motion of G. H., counsel for the above-named plaintiff,

ORDERED: That the summons herein, a copy of which is hereto annexed, be served by publication of the same in two newspapers as follows: in the , published in , and in the , published in , once in each week for (six weeks); and that a copy of the summons and complaint be forthwith deposited in the post-office, directed to the (president) of the defendants at his said place of residence, and the postage paid thereon.

Order where Defendant has Departed or Conceals Himself.

(Title of cause.)

(Caption.)

It appearing to the satisfaction of the court by the annexed affidavit (and complaint) that a cause of action exists against the defendant , in favor of the above-named plaintiff; but that the said defendant cannot, after due diligence, be found within this State, he having departed therefrom (or he keeping himself concealed within this State), with intent to defraud his creditors (or with intent to avoid the service of summons, or both), and that the defendant's residence is at (or is unknown, and cannot with due diligence be ascertained); on motion of A. Z., plaintiff's counsel,

ORDERED: That the summons herein, a copy whereof is hereto annexed, be served by publication of the same in two newspapers, as follows: In the , published in , and in the , published in , once in each week for (six weeks) (and where defendant's residence is known add), and that a copy of the summons and complaint be forthwith deposited in the post-office, directed to said defendant at his said place of residence, and the postage paid.

Order where action is for divorce—Requisites of the summons.

Order where the Action is for Divorce.

(Title of cause.)

(Caption.)

It appearing to the satisfaction of the court by the annexed affidavit (and complaint) that this action is brought for a divorce in one of the cases prescribed by law, and that the defendant cannot be found within this State after due diligence, and that he resides at _____, in the State of _____ (or that his residence is not known, and cannot, with reasonable diligence, be ascertained by the plaintiff); on motion of A. Z., plaintiff's counsel,

ORDERED: (as in preceding form.)

Section 4. Requisites of the summons. The summons to be published should be in the same form as a summons to be personally served, and should contain all the essentials of a valid summons as prescribed by sections 128, 129 of the Code. The summons as published should be a literal copy of the original on file, yet a literal and exact copy in every respect is not requisite, if it is substantially correct in all its material particulars.

Van Wyck v. Hardy, 39 How. 392. It is not necessary that it should mention the name of the State in designating where it has been or will be filed. *Cook v. Kelsey*, 19 N. Y. (5 Smith) 412. So an omission to state in what city the attorney for the plaintiff resides is not a fatal defect, if from the other parts of the summons the residence of the attorney could be reasonably inferred. The only requisite in respect to these technical requirements is, that no omission has been made by which the defendant could be misled. *Van Wyck v. Hardy*, 39 How. 392; *Jacquerson v. Van Erben*, 2 Abb. 315.

Instead of inserting in the body of the copy of the summons published, the notice of the place where the original has been filed, it is customary to give this information in a notice appended to the copy as published. This practice is regular and is approved by high authority. *Cook v. Kelsey*, 19 N. Y. (5 Smith) 412. This notice may be in the following form:

Notice appended to summons.

To the defendant, Y. Z.

Take notice, That the summons in this action, of which the foregoing is a copy, was filed in the office of the clerk of the court, at _____, in the county of _____, in the State of New York, on the _____ day of _____.

(Date.)

(Signature and address of attorney.)

Publication of summons — Depositing summons in post-office.

Section 5. Publication of the summons. The summons must be published for the time specified in the order, and in the designated papers. Publication in a paper other than the one designated in the order, although published in the same place, is fatal to the validity of the proceedings. *Brisbane v. Peabody*, 3 How. 109. The complaint need not be published. *Anonymous*, 3 id. 293; S. C., 1 Code R. 102.

In the absence of any public newspaper actually published in the county of Hamilton, a summons published in the county of Fulton will be valid, although the Code requires that in actions for the foreclosure of mortgages, the summons must be published in a newspaper of the county where the mortgaged premises are situated. See *Laws of 1866*, ch. 95; *Laws of 1870*, ch. 662; *Wait's Code*, 175, *r*. The computation of the time for the publication is to be made by excluding the first day of publication, and including that which completes the full period required. The shortest period allowable under the statute is six weeks, or forty-two days. *Brod v. Heymann*, 3 Abb. N. S. 396. See *People v. Gray*, 10 Abb. 468; S. C., 19 How. 238; *Olcott v. Robinson*, 21 N. Y. (7 Smith) 150.

Section 6. Depositing summons in the post-office. When the order for publication directs that a copy of the summons and complaint be forthwith deposited in the post-office, directed to the person to be served, at his place of residence, the order must be literally complied with. *Hallett v. Richters*, 13 How. 43; *Back v. Crussell*, 2 Abb. 386; *Mosier v. Wafal*, 56 Barb. 80. No definition of the term "*forthwith*" has ever been given by the Code. When used in a rule of the court it has been construed to mean within twenty-four hours, but when used in connection with the deposit of a summons and complaint in a post-office, it must be construed to mean within a reasonable time, all the circumstances of the case being considered. The reasonableness of the time will depend chiefly upon the number of defendants to be served. *Van Wyck v. Hardy*, 39 How. 392. The postage on the summons and complaint should be prepaid. Code, § 411.

Section 7. Personal service out of the State. Personal service of a copy of the summons and complaint on a defendant without the State is equivalent to publication and deposit in the post-office. Code, § 135. Therefore, where, under an order for the publication of a summons, personal service is made beyond the limits of the State, the mailing of the summons and complaint

 Service out of State — When defendant may come in and defend.

becomes unnecessary. Such service does not, however, become effective until the time prescribed by the order for publication has expired, *post*, 530, 531; *Abrahams v. Mitchell*, 8 Abb. 123; *Tomlinson v. Van Vechten*, 6 How. 199; S. C., 1 Code R. N. S. 317; *Richardson v. Bates*, 23 How. 516; *Peck v. Cook*, 41 Barb. 549, 553.

In one special term case it was held that a personal service of the summons and complaint out of the State, in a case in which publication had been ordered, was sufficient to complete the service, and that the defendant must answer within twenty days after such personal service. *Dykers v. Woodward*, 7 How. 313. Service of the summons alone will be insufficient. *Morrell v. Kimball*, 4 Abb. 352. And, in any case, personal service out of the State can have no greater effect than its statutory equivalent, publication and deposit in the post-office. So that, if the affidavit upon which the order for publication was based is defective in any particular affecting the jurisdiction of the court making the order, the personal service of the summons and complaint upon the defendant in another State will be a nullity. *Peck v. Cook*, 41 Barb. 549; *Fiske v. Anderson*, 33 id. 71; S. C., 12 Abb. 8.

Section 8. When defendant may come in and defend. The defendant against whom publication is ordered, or his representatives, on application and sufficient cause shown, at any time before judgment, must be allowed to defend the action; and, except in an action for divorce, the defendant against whom publication is ordered, or his representatives, may in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within seven years after its rendition, on such terms as may be just; and if the defense be successful, and the judgment or any part thereof have been collected or otherwise enforced, such restitution may thereupon be compelled as the court directs, but the title to property sold under such judgment to a purchaser in good faith shall not be thereby affected. Code, § 135. But in cases in which a formal notice of judgment has been given, the time in which a defense must be interposed is limited to one year after such notice; or, if no notice has been given, to seven years after the rendition of the judgment. The defendant cannot claim a right to defend, as of course, after judgment. The allowance of an application of this nature, and the terms on

Filing complaint, affidavit and order.

which it may be granted, are wholly within the discretion of the court. See *Roche v. Ward*, 7 How. 416.

Mere technical irregularities in the proceedings will not be deemed a sufficient ground for allowing a defense to be interposed after judgment. *Van Wyck v. Hardy*, 39 How. 392; *Jacquerson v. Van Erben*, 2 Abb. 315. These irregularities will be amended, or wholly disregarded. But a jurisdictional defect will at all times be a ground for opening a judgment, and no delay on the part of the defendant to assert his rights can confer jurisdiction and render valid that which is absolutely void. *Hallett v. Richters*, 13 How. 43; *Titus v. Relyea*, 16 id. 371; S. C., 8 Abb. 177; *Fiske v. Anderson*, 33 Barb. 71. But delay will bar a motion to open a judgment, or to interpose a defense on the ground of irregularity. *Abrahams v. Mitchell*, 8 Abb. 123. The party seeking to be allowed to come in and defend should apply on the ground that his own rights have been invaded, and not on the ground of injustice done to a co-defendant. *Chapman v. Lemon*, 11 How. 235.

The fact that such an application is granted will not *per se* open the judgment or stay proceedings upon execution. To have this effect an additional clause must be inserted in the order. *Carswell v. Neville*, 12 How. 445.

Section 9. Filing complaint, affidavit and order. The Code directs that in all cases, where publication is made, the complaint must be first filed and the summons as published must state the time and place of such filing. Code, § 135. A neglect to comply with this first requirement will be fatal to a subsequent judgment. *Kendall v. Washburn*, 14 How. 380; *Hallett v. Richters*, 13 id. 43; *Titus v. Relyea*, 8 Abb. 177; S. C., 16 How. 371; and see *Talcott v. Rosenberg*, 8 Abb. N. S. 287, 293; S. C., 3 Daly, 263. The summons need not be filed until annexed to the judgment roll. *Van Wyck v. Hardy*, 39 How. 392. The Code is silent as to the necessity of filing the affidavit on which an order of publication has been granted, or the necessity of filing the order itself. The rules of the court, however, require that the affidavit should be filed forthwith, together with the order obtained upon it, and they further provide that, on the neglect of the plaintiff's attorney to comply with this requirement, the defendant shall be at liberty to move the court to vacate the proceedings for irregularity, with costs. Rule 5, Supreme Court. See, also, rule 7, id. The word "forthwith" as used in this connection

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Unknown parties — Affidavit in case of unknown owners.

must be construed to mean within twenty-four hours. *Van Wyck v. Hardy*, 39 How. 392. This rule is, however, seldom strictly enforced. See *Vernam v. Holbrook*, 5 id. 3; *Brash v. Wielarsky*, 36 id. 253; *Woodward v. Stearns*, 10 Abb. N. S. 395; *Leffingwell v. Chave*, 19 How. 54; S. C., 5 Bosw. 703; 10 Abb. 472.

Section 10. Unknown parties. By the amendment of the Code in 1860, the provisions of section 135 were extended to a new class of cases. It was provided by that amendment that in actions for the foreclosure of mortgages on real estate, already instituted, or hereafter to be instituted, if any party or parties having any interest in, or lien upon, such mortgaged premises, are unknown to the plaintiff, and the residence of such party or parties cannot, with reasonable diligence, be ascertained by him, and such fact shall be made to appear by affidavit to the court, or a justice thereof, or to the county judge of the county where the trial is to be had, such court, justice or county judge may grant an order that the summons be served on such unknown parties by publishing the same for six weeks, once in each week successively, in the State paper and in a newspaper printed in the county where the mortgaged premises are situated; and that such publication shall be equivalent to a personal service.

The mailing of a summons and complaint is, from the nature of the case, an impossibility.

Affidavit in case of unknown owners.

(*Title of cause.*)

(*Venue.*)

A. B., the plaintiff in the above entitled action, being duly sworn, says:

I. That this action is brought to foreclose a mortgage made on the day of , by the above-named defendant, W. J., to this plaintiff, to secure his bond of even date, conditioned for the payment of dollars, on certain real property in this State, consisting of , situated in , county of .

II. That certain persons, whose names and residence are unknown to this plaintiff, have an interest in (or lien upon) the above-mentioned premises, arising (*state the source and nature of such interest or lien.*)

III. That deponent has made diligent inquiries to ascertain the names and residences of such persons, having such interest in (or lien upon) the aforesaid premises (*state what inquiries*

Order in case of unknown owners — Statute to be pursued — Amending proceedings.

have been made), but that such names and residences cannot, upon such diligent inquiry, be ascertained.

(*Jurat.*)

(*Signature.*)

Order in case of unknown owners.

(*Title of cause.*)

(*Caption.*)

It appearing to the satisfaction of the court by the annexed affidavit (and complaint), that this action is brought to foreclose a mortgage upon certain real property in this State, situated in _____, and that there are certain persons who have an interest in (or lien upon) such premises, whose names and residences are unknown, and cannot, with reasonable diligence, be ascertained. On motion of Q. R., plaintiff's counsel:

ORDERED: That the summons herein, a copy of which is hereto annexed, be served on such unknown owners by publication for six weeks, once in each week successively, in the State paper, to wit: the _____ published at Albany, and also in the _____, a newspaper published in the county of _____ (where the mortgaged premises are situated).

Section 11. Statute to be pursued strictly. In every step of the proceedings from the preparation of the affidavit for the application for the order directing the publication of the summons, to the completion of the service, every requirement of the statute should be carefully observed and strictly complied with. The jurisdiction of the court in cases of substituted service is strictly statutory, and can only be acquired in the mode prescribed by the statute. The omission of any act essential to jurisdiction will be fatal to a subsequent judgment. *Cook v. Farren*, 34 Barb. 95; S. C., 21 How. 286; 12 Abb. 359; *Peck v. Cook*, 41 Barb. 549; *Hallett v. Righters*, 13 How. 43; *Wortman v. Wortman*, 17 Abb. 66; *Morrell v. Kimball*, 4 id. 352; *Evertson v. Thomas*, 5 How. 45; S. C., 3 Code R. 74; *Talcott v. Rosenberg*, 8 Abb. N. S. 287.

Section 12. Amending proceedings. After the service of the summons is complete, the court may amend whatever is irregular, but cannot amend any of the proceedings tending to confer jurisdiction. *Hallett v. Righters*, 13 How. 43; *Moulton v. de ma Carty*, 6 Rob. 470; *Talcott v. Rosenberg*, 8 Abb. N. S. 287. Thus, where the summons misstates the day of filing the complaint, the error may be amended or disregarded. *Jacquerson v. Van Erben*, 2 Abb. 315. So, where the summons, as published, is not, in some immaterial point, an exact copy of the original, the

Judgment.

irregularity may be amended or disregarded. *Van Wyck v. Hardy*, 39 How. 392. The same rule applies to every defect not depriving the court of jurisdiction.

Section 13. Judgment. No judgment can be entered in actions for the recovery of money only, when the summons has been served by publication, unless the plaintiff, at the time of making the application for judgment, shall show by affidavit that an attachment has been issued in the action, and levied upon property belonging to the defendant. This affidavit must contain a specific description of the property, and a statement of its value, and must be attached to and filed with the affidavits of publication. Neither can any judgment be entered in such action unless the plaintiff, at the same time, produces and files with the clerk an undertaking for not less than the amount of the judgment, with two sureties to be approved by the court, that the plaintiff will abide the order of the court touching the restitution of any estate or effects which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under or by virtue of such judgment, in case the defendant or his representatives shall apply and be admitted to defend the action, and shall succeed in such defense. Rule 34, Supreme Court. The authority of the clerk to enter judgment exists only when the summons has been personally served. *Hallett v. Richters*, 13 How. 43. The application, in other cases, must be made to the court upon the proof required by section 246 of the Code. *Id.* This subject will be discussed at length in a subsequent part of the work. See Judgment on Failure to Answer.

A judgment in an action for the recovery of money only, commenced by the service of a summons by publication, can in no event affect any property of the defendant, except such as has been taken by virtue of an attachment regularly issued in the action. *Warren v. Tiffany*, 17 How. 106 ; S. C., 9 Abb. 66. It is a judgment *in rem*, and not *in personam*, and has no validity whatever out of the State where it is rendered. *Force v. Gower*, 23 How. 294 ; *Fiske v. Anderson*, 33 Barb. 71 ; S. C., 12 Abb. 8 ; *Kane v. Cook*, 8 Cal. 449.

Substituted service — In what cases authorized — Affidavit or return.

ARTICLE IV.

SUBSTITUTED SERVICE.

Section 1. In what cases authorized. The laws of 1853 provide for a statutory equivalent for the personal service of a summons on a defendant residing in this State, whenever it shall satisfactorily appear to any court, or any judge of the supreme court, or any county judge, by the return or affidavit of any sheriff, deputy-sheriff, or constable authorized to serve or execute any process or paper for the commencement or in the prosecution of any action or proceeding, that proper and diligent effort has been made to serve any such process or paper on the defendant in such action, and that he cannot be found, or, if found, avoids or evades such service, so that the same cannot be made personally by proper diligence and effort. Laws of 1853, ch. 511.

By an amendment of this act in 1863, it was provided that none of the provisions of this act shall be deemed applicable to or in anywise relate to officers, soldiers or musicians while actually absent from their town or place of residence, and actually engaged in the army or military service of the United States, nor to any sailor or marine actually absent from his place of residence and actually engaged in the naval service of the United States, except in partition cases or actions, or proceedings where no personal claim is made against such party so employed. Laws of 1863, ch. 212.

The act of 1853 was evidently intended to supply a defect in the statutes, acknowledged in the case of *Van Rensselaer v. Dunbar*, 4 How. 151. See *Foot v. Harris*, 2 Abb. 454. It applies only to cases where the defendant cannot be found either in or out of the State, or, where being found, he avoids or evades service. *Foot v. Harris*, 2 id. 454. It does not apply where the defendant is temporarily absent from the State, without intent to evade personal service, and where his address is known. *Collins v. Campfield*, 9 How. 519; *Jones v. Derby*, 1 Abb. 458. See *Baker v. Stephens*, 10 Abb. N. S. 1.

Section 2. Affidavit or return. The essential facts to establish by affidavit are: (1) That the defendant is a resident of this State. *Collins v. Ryan*, 32 Barb. 647. (2) That proper and diligent effort has been made to serve a summons on him without

Affidavit of inability to make personal service.

avail, *Baker v. Stephens*, 10 Abb. N. S. 1, 27. (3) That he cannot be found either in or out of this State, or, if found, that he evades or avoids personal service. *Foot v. Harris*, 2 Abb. 454. (4) That he is not an officer, soldier, or musician in the army, or a sailor or marine in the navy of the United States, or if defendant is so employed, that the action is for the partition of real estate, or that no personal claim is made against him. Laws of 1863, ch. 212.

*Affidavit of Inability to make Personal Service.**(Title of cause.)**(Venue.)*

A. B., being duly sworn, says:

I. That he is (a deputy) sheriff of _____ county aforesaid.

II. That a summons, a copy of which is hereunto annexed, was delivered to him for service upon the defendant, Y. Z.

III. That the said Y. Z. resides in this State, to wit, at _____
*(state facts showing that he has a residence as alleged).*IV. That the deponent has made diligent and proper efforts to serve the said summons upon the said Y. Z. *(state what efforts have been made)*, but that the said Y. Z. cannot be found in or out of the State, nor can the deponent ascertain when he will be at home, although he has made diligent inquiry of _____, but that the said Y. Z. evades or avoids such service by *(state concisely how such service is avoided)*, so that the said summons cannot be served properly by proper and diligent effort.*(Jurat.)**(Signature.)**Affidavit that the Defendant is not a Soldier.**(Title of cause.)**(Venue.)*

C. D., being duly sworn, says:

That he is acquainted with Y. Z., the defendant in this action referred to in the annexed affidavit, and that the said defendant is not an officer, soldier or musician, actually absent from his place of residence, and actually engaged in the army or military service of the United States, nor a sailor or marine actually absent from his place of residence, and actually engaged in the naval service of the United States, but that he is *(state defendant's occupation, if he has any)*.*Affidavit of the Nature of the Action, or of no Personal Claim when Defendant is a Soldier, etc.**(Title and Venue.)*

E. F., being duly sworn, says:

I. That he is the attorney of the plaintiff in this action.

The order — Order for substituted service.

II. That this action is brought for the partition of real property, to wit: (*describe property*) as appears by the complaint on file, *or*

III. That this action is brought (*state object of the action*), and that no personal claim is made against the defendant, Y. Z.
(*Jurat.*) (*Signature.*)

Section 3. The order. On the receipt of such affidavit or return, the court may, by order, direct service to be made by leaving a copy of the summons at the residence of the person to be served, with some person of proper age, if admittance can be obtained, and such proper person found, who will receive the same, and if such admittance cannot be obtained or any such proper person found who will receive it, then by affixing the copy of the summons to the outer or other door of said residence, and by putting another copy properly folded or enveloped and pre-paid in the post-office, directed to the person to be served, at his place of residence. Laws of 1853, ch. 511.

Order for Substituted Service.

(*Title of cause.*)

(*Caption.*)

It satisfactorily appearing by the affidavit of _____, (a deputy) sheriff of the county of _____, that the summons in this action, a copy of which is hereunto annexed, has been delivered to the said _____ to be served, and that the defendant named therein, is a resident of _____, in said county; that said _____ has made proper and diligent effort to serve the same personally upon him, and that such defendant cannot be found either within or without this State (*or*, that such defendant avoids *or* evades such service) so that the same cannot be served; and it further being shown to my satisfaction (*or* to the satisfaction of the court), by the affidavit of _____, annexed, that _____ is not an officer, soldier or musician, actually absent from his place of residence, and actually engaged in the army or military service of the United States, nor a sailor or marine actually absent from his place of residence, and actually engaged in the naval service of the United States; *or*, and it further being shown to my satisfaction (*or*, to the satisfaction of the court), that the action is one for the partition of real estate (*or*, that no personal claim is made against said _____); on motion of _____, counsel for the plaintiff.

ORDERED: That the service of the said summons be made by leaving a copy thereof at the residence of said defendant (in the town of _____) with some person of proper age, if admittance can be obtained, and such proper person found who will receive the same, and if admittance cannot be obtained, nor any such

Service under order — Proceedings after service — Service in other cases.

proper person found who will receive the same, then that the said service be made by affixing the same to the outer or other door of said residence, and by putting another copy thereof, properly folded or enveloped, and directed to the person to be served, at his said place of residence, into the post-office in the said (town) where he resides, and paying the postage thereon.

Section 4. The service under the order. The service of the summons must be made in the manner prescribed by the order.

Section 5. Proceedings after service. Upon the service of the summons under the order, the plaintiff's attorney should file an affidavit with the clerk of the county where the defendant resides, or of the county where the complaint must be filed, showing that the service was made according to the order. On such filing, the service is deemed complete, and the same proceedings may be taken under such service as if the summons had been served personally or in any other manner authorized by law. But the court may, upon any application by them deemed reasonable at any time, permit the defendant to appear and defend, or have any other relief in any action or proceeding founded on such service as the nature of the case may require. Laws of 1853, ch. 511. If the defendant seeks to have the proceedings under the service set aside on the ground that the order for substituted service was improperly issued, and the proceedings thereunder void, the objection must be taken by motion or by an appeal. The proceedings cannot be attacked collaterally. *Baker v. Stephens*, 10 Abb. N. S. 1; *Collins v. Ryan*, 32 Barb. 647.

ARTICLE V.

SERVICE IN OTHER CASES IN WHICH DEFENDANT CANNOT BE FOUND.

The act of 1840, as amended in 1842, furnishes a remedy not contained in the provisions of the Code, relating to the service of a summons by publication, as to a class of defendants in partition suits, whose last known residence was within the State, but whose residence at the time cannot, on due inquiry, be ascertained.

The practice in actions under this act will be discussed under the title relating to suits in partition, and will be found to conform substantially to the practice in actions under section 135 of the Code, so far as relates to the service of the summons. As to

Service on joint and several debtors.

the act itself, see Laws of 1842, ch. 277; 4 Edm. St. 533; and *Close v. Van Husen*, 6 How. 157; S. C., 1 Code R. N. S. 408; *Foot v. Harris*, 2 Abb. 454.

The notice to be published in the State and other papers under this act should be substantially in the following form :

Notice to Absent Defendant under the Act of 1842.

Before the court.
County of .

A. B., plaintiff,
 agst.
C. D., defendants.

Complaint for
(partition of land.)

E. F., one of the defendants in this cause, whose place of residence is unknown, is required to appear in this cause, by the day of next, or the plaintiff will apply to the court for the relief demanded in the complaint.

(*Signature and address of the plaintiff's attorney.*)
(*Date.*)

ARTICLE VI.

SERVICE ON JOINT AND SEVERAL DEBTORS.

Section 1. In what cases. The Code makes express provisions for proceedings in actions where there are several defendants, and the summons has been served on one or more of them, but not on all. Code, § 136. These provisions relate rather to the effect of such service in specified cases on the rights and proceedings of the parties, than to the mode of effecting such service. They relate also exclusively to proceedings in actions on contract.

In actions not founded on contract, a defendant not served with a summons is not a party to an action. *Robinson v. Crost*, 14 Barb. 536.

Section 2. Proceedings by plaintiff. The plaintiff, in actions against defendants jointly indebted on contract, may proceed against the defendant served, unless the court otherwise direct; and, if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendants served, or, if they are subject to arrest, against the persons of the defendants served.

If the action be against defendants severally liable, he may

proceed against the defendants served as if they were the only defendants. Where all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants if the action had been against them or any of them alone.

If the name of one or more partners shall, for any cause, have been omitted in any action in which judgment shall have passed against the defendants named in the summons, and such omission shall not have been pleaded in such action, the plaintiff, in case the judgment therein shall remain unsatisfied, may by action recover of such partner separately upon proving his joint liability, notwithstanding he may not have been named in the original action. Code, § 136.

When a judgment shall be recovered against one or more of several persons jointly indebted on contract, by proceeding under section 136, the plaintiff may summon those who were not served in the original action, to show cause why they should not be bound by the judgment in the same manner as if they had been originally summoned. Code, § 375.

The service of a summons on a part only of the joint debtors can only be the means of reaching the joint and several property of those served, and the *joint* property of the defendants not served. *Northern Bank of Kentucky v. Wright*, 5 Rob. 604. Where the property thus levied on is insufficient to satisfy the judgment in the original action, the Code provides in section 375 a means of reaching the separate property of the defendants not originally served. Where a joint debtor has not been served with a summons, but judgment in form has been entered against him under section 136, he must not be considered as a judgment debtor within the meaning of section 376. The proceedings under section 375 and section 376 are intended to apply to a totally distinct class of cases. The one is a proceeding by means of which a joint debtor may be made a judgment debtor; the other a proceeding by which a judgment debtor's estate, after his decease, may be subjected to the payment of the judgment against him. *Foster v. Wood*, 30 How. 284; S. C., 1 Abb. N. S. 150; *Kellogg v. Olmstead*, 6 How. 487.

The summons, under section 375, cannot issue against a joint debtor not served with a summons in the original action, where in such action a judgment was rendered in the marine court for

Rights of defendants and proceedings by them — Service, when complete.

more than \$25, exclusive of costs, and a transcript thereof filed with the county clerk. *Ticknor v. Kennedy*, 4 Abb. N. S. 417.

Section 3. Rights of defendants and proceedings by them.

Upon such summons, any party summoned may answer within twenty days, and may set up any defense which he might have made in the original action, or any that may have arisen subsequent to the judgment. Code, § 379.

But the defendant cannot plead the statute of limitations as a bar to this action. *Berlin v. Hall*, 48 Barb. 442.

Although one of several joint defendants may waive any defense which might be made by him, he cannot waive the rights and defense of a co-defendant, and, until judgment is entered in form against all, each defendant has a right to appear at every trial of the issues. *Brown v. Richardson*, 4 Rob. 603.

And although, under the Code, a plaintiff may recover against one defendant out of several upon his several contract, notwithstanding he has alleged it in his complaint to be joint, he cannot deprive a defendant served with process from the right of having his co-contractors joined with him, in order to have judgment entered against them all, to be enforced against their joint property under section 136. *Niles v. Battershall*, 27 How. 381; S. C., 18 Abb. 161; 2 Rob. 146.

The courts will not allow the provisions of the Code, as to service upon joint debtors, to be made the means of obtaining judgment against a firm, through the collusion of a partner with the plaintiff. A judgment so entered will be promptly set aside. *Griswold v. Griswold*, 14 How. 446; *Bridenbecker v. Mason*, 16 id. 203; *Everson v. Gehrman*, 10 id. 301; S. C., 1 Abb. 167.

ARTICLE VII.

SERVICE, WHEN COMPLETE.

Section 1. When service is by publication. In the cases mentioned in section 135 of the Code, the service of the summons shall be deemed complete at the expiration of the time prescribed by the order for publication. Code, § 137.

If the time prescribed by the order is six weeks, the service is not complete until the expiration of the full time, or forty-two days. *Richardson v. Bates*, 23 How. 516; *Brod v. Heymann*, 3 Abb. N. S. 396; *Abrahams v. Mitchell*, 8 Abb. 123. The defendant's time for answering does not expire until the lapse of

In case of personal service—When a provisional remedy is allowed.

twenty days thereafter. *Brod v. Heymann*, 3 Abb. N. S. 396; *Richardson v. Bates*, 23 How. 516; *Abrahams v. Mitchell*, 8 Abb. 123; *Tomlinson v. Van Vechten*, 1 Code R. N. S. 317; S. C., 6 How. 199.

Section 2. In case of personal service. Personal service, if made within the State, is complete at the time of the delivery of a copy of the summons to the party served. This rule does not, however, apply to personal service out of the State. By the language of section 135 of the Code, personal service out of the State is made, not a substitute for personal service within the State, but an equivalent to publication and deposit in the post-office. It can have no greater effect than such service, and must be subject to the same restrictions. Judgment cannot, in any case, under an order for publication, be taken by default before the expiration of the full time for publication, and of the full twenty days within which the defendant is allowed to appear and answer. *Richardson v. Bates*, 23 How. 516; *Downer v. Mellen*, 50 Barb. 232; *Abrahams v. Mitchell*, 8 Abb. 123; *Tomlinson v. Van Vechten*, 1 Code R. N. S. 317; S. C., 6 How. 199. This time should be computed by excluding the first day and including the full period which is required thereafter. *Brod v. Heymann*, 3 Abb. N. S. 396; Code, § 425.

Section 3. When a provisional remedy is allowed. The allowance of a provisional remedy in no way affects or dispenses with the service of a summons. The Code provides that certain provisional remedies may be allowed and become effectual, in case a summons shall be served within a specified time thereafter. § 227. On the completion of the service of the summons, the remedy hitherto conditional becomes absolute, and an action is commenced. The summons must, however, invariably be served before the action can be carried to a final determination. *O'Hara v. Brophy*, 24 How. 379; *Waffle v. Goble*, 35 id. 356; S. C., 53 Barb. 517.

Section 4. By voluntary appearance. If, after the issuing of a summons for the commencement of an action, the defendant voluntarily appears generally, the service of the summons may be deemed complete. A voluntary appearance of a defendant is equivalent to personal service of the summons upon him. Code, § 139; *Higgins v. Rockwell*, 2 Duer, 650; *Wellington v. Clasons*, 18 How. 10; S. C., 9 Abb. 175. See Supreme Court, Rule 14.

ARTICLE VIII.

IRREGULAR, DEFECTIVE OR FRAUDULENT SERVICE.

Section 1. What is such service. The court, upon a proper application, will generally, if not always, interfere to correct the irregular, defective or fraudulent service of process or papers in the course of an action. When such acts are merely irregularities, and when they are nullities, will be fully explained in a subsequent place. What constitutes a fraudulent service of process has been noticed, *ante*, 509 to 511.

The service of a summons by a party to the action is impliedly forbidden by section 133 of the Code, and such service is an irregularity. *Myers v. Overton*, 2 Abb. 344; S. C., 4 E. D. Smith, 428; *Hunter v. Lester*, 18 How. 347; S. C., 10 Abb. 260. So the service of a summons on the Sabbath, being contrary to a statute, is utterly void. *Hastings v. Farmer*, 4 N. Y. (4 Comst.) 293. Defective service includes both irregular and void service. It may result from a failure to comply with the letter of the statute, or from an intentional violation of both its letter and its spirit.

Fraudulent service on the other hand is a service which may be in form within the letter of the statute or the rules of law, and yet be in violation of the spirit and intent, and with the preconceived design of evading such legal provisions. Thus, where a party is induced to come within the jurisdiction of the court by false and fraudulent representations, for the sole purpose of effecting the service of a summons upon him, such service is in every respect fraudulent, although the wrongful act of service is in the usual mode. *Carpenter v. Spooner*, 2 Sandf. 717; S. C., 2 Code R. 140; *Metcalf v. Clark*, 41 Barb. 45. Such service is not, however, absolutely void, as the court will acquire jurisdiction by the service of the summons, unless the defendant resorts to his motion to set aside the summons. By a void service of process a court can acquire no jurisdiction of the person of the defendant, and consequently he cannot be divested of his property or rights by any proceedings thereunder. *Meeks v. Noxon*, 1 Abb. 280; S. C., 11 How. 189. Such service can never be cured by amendment. *Hallett v. Richters*, 13 How. 43. See *post*, 541.

Remedy of injured party — Proof of service.

Section 2. Remedy of injured party. A defendant cannot raise an objection to the improper service of a summons by demurrer or answer. His remedy is by motion to have the service of the summons and all subsequent proceedings set aside. *Nones v. Hope Mutual Life Insurance Company*, 5 How. 96; S. C., 3 Code R. 161; 8 Barb. 541. The motion to set aside *the summons* is proper, strictly speaking, only when the defect is in the summons itself and not in the service. *Metcalf v. Clark*, 41 Barb. 45. See *Van Wezel v. Van Wezel*, 1 Edw. Ch. 113; *Petrie v. Fitzgerald*, 1 Daly, 401. When the objection is technical, and affects only the regularity of the service, as where service has been made by a party to the action, this motion should be made at the earliest opportunity. And as a general rule all motions for relief on the ground of irregularity must be made before judgment. *Myres v. Overton*, 2 Abb. 344; S. C., 4 E. D. Smith, 428; *Hunter v. Lester*, 10 Abb. 260; S. C., 18 How. 347. But where the defect is one of substance, and deprives the court of jurisdiction, no delay on the part of the defendant to object to such defect will deprive him of his right to have the service of the summons and all subsequent proceedings set aside as void. *Titus v. Relyea*, 8 Abb. 177; S. C., 16 How. 373; *Williams v. Van Valkenberg*, id. 144; *Hallett v. Richters*, 13 id. 43. So where there has been a fraudulent service, as by enticing the defendant to come within the jurisdiction of the court, for the purpose of making service upon him, or where there has been a pretended service, as by serving a summons in a disguised form, the service may be set aside. *Metcalf v. Clark*, 41 Barb. 45; *Goupil v. Simonson*, 3 Abb. 474; *Bulkley v. Bulkley*, 6 id. 307; *Carpenter v. Spooner*, 2 Sandf. 717; S. C., 2 Code R. 140; *Benninghoff v. Oswell*, 37 How. 235. And, if the defects are such as to deprive the court of jurisdiction, the motion may be made after judgment, although the action was for divorce, and a decree had been obtained. *Bulkley v. Bulkley*, 6 Abb. 307.

ARTICLE IX.

PROOF OF SERVICE.

Section 1. By sheriff's certificate. Proof of the service of a summons may be made either by the certificate of the sheriff, by affidavit, or by admission.

Proof of — By sheriff's certificate.

The sufficiency of the evidence of a sheriff's certificate, as a proof of the service of a summons, depends upon the capacity in which such service was made. A sheriff can act in an official character only within the limits of the county in which he was elected, and all acts performed by him beyond such territorial limits are the acts of a private person, and must be proved as such. *Farmers' Loan & Trust Co. v. Dickson*, 17 How. 477; S. C., 9 Abb. 61; *Thurston v. King*, 1 id. 126; *Morrell v. Kimball*, 4 id. 352.

But the certificate of a sheriff of the service of a summons within his own county is conclusive evidence of the fact of such service, as against all persons but the defendant. *Brien v. Casey*, 2 Abb. 416; *Columbus Insurance Co. v. Force*, 8 How. 353. It may, however, be impeached by the defendant, and when so assailed must be sustained by affidavit. *Van Rensselaer v. Chadwick*, 7 How. 297; *Wallis v. Lott*, 15 id. 567; *Sperling v. Levy*, 1 Daly, 95. The return of a deputy is, in legal effect, the return of the sheriff, when made in the name of that officer, and is equally as valid as evidence. But the return ought to be in the name of the sheriff, and not in that of the deputy, *as deputy*. *Simonds v. Catlin*, 2 Caines, 61; *Joice v. Joice*, 5 Cal. 449.

A sheriff's return does not lose its validity by lapse of time, or by having once been used as evidence. *Brien v. Casey*, 2 Abb. 416; *Columbus Ins. Co. v. Force*, 8 How. 353. The certificate should in some manner identify the summons served, either by indorsement upon it, by referring to it as annexed, or by stating the title of the cause in which such service was made. *Board v. Board*, 4 Abb. 295, 305; *Litchfield v. Burwell*, 5 How. 341; S. C., 1 Code R. N. S. 42; 9 N. Y. Leg. Obs. 182. The time and place of service should also form a part of the certificate. Code, § 188.

In general, a sheriff's certificate is valid and conclusive in all matters where such return is required by law, but no further; and, for this reason, an indorsement on a summons setting forth the time of its receipt is not evidence of the time of the commencement of an action under section 99 of the Code. *Wardwell v. Patrick*, 1 Bosw. 406; *Utica City Bank v. Buel*, 9 Abb. 385; S. C., 17 How. 498, *ante*, 484, 485.

Sheriff's certificate of service on defendant personally — By affidavit.

Sheriff's Certificate of Service on the Defendant Personally.

(Title of cause.)
(Venue.)

I hereby certify that on the day of , at ,
I served on (one of the defendants) above
named, the (within) summons (and complaint) in this action, by
delivering a copy thereof to him personally, and leaving the
same with him.

(Date.)

OLIVER GETMAN,
Sheriff of Fulton Co., N. Y.

Section 2. By affidavit. Where the service of a summons has been made by any person other than a sheriff, the fact must be shown by the affidavit of the person making the service, or by the written admission of the party served. This rule also applies to a service made by a sheriff out of his county, or the act of any officer authorized to serve process, when acting in an extra official capacity. *Van Rensselaer v. Chadwick*, 7 How. 297; *Wallis v. Lott*, 15 id. 567.

The requisites of an affidavit of service have been established by the Code, and the rules of the supreme court.

The Code requires that, except where service has been made by publication, the affidavit must state the time and place of service. Code, § 138.

The rules of the court require additional proof, not only of the manner of service, but of the capacity of the person subscribing the affidavit to make a valid service.

“Where the service of the summons, and of the complaint or notice, if any, accompanying the same, shall be made by any other person than the sheriff, it shall be necessary for such person to state in his affidavit of service, the age of the person making the service (if under age), when and at what particular place he served the same, and that he knew the person served to be the person mentioned and described in the summons as defendant therein; and also to state in his affidavit that he left with the defendant such copy, as well as delivered it to him.” Rule 23, Supreme Court. The clause of such a rule requiring the affidavit to state when and in what particular place the service was made has been held to be satisfied, by a statement that the service was made in a specified county of the State. *Lewis v. Hartel*, 24 Wis. 504; *Sayles v. Davis*, 20 id. 302.

“In actions for divorce, the affidavit shall state what knowledge the affiant had of the person served being the defendant, and how he acquired such knowledge. The court may require the affiant to appear in court, and be examined in respect thereto.” Rule 24, Supreme Court.

Affidavit of Personal Service.

(Venue.)

(Signature.)

Affidavit of personal service in actions for divorce.

Affidavit of Personal Service in actions for Divorce.

(Title of cause.)

(Venue.)

A. B., being duly sworn, says, that he is a clerk in the office of _____, attorney for the plaintiff herein; that he is over _____ years of age; that, on the _____ day of _____, 18____, he served on _____ defendant above named, at _____ (*specify as particularly as possible the place of service*), the within summons (and complaint) by delivering a copy thereof to (him) personally, and leaving the same with (him).

Deponent further says, that he knows the person so served to be the person mentioned and described in the summons as defendant therein, from (*state what knowledge the deponent had of the person being served being the defendant, and how he acquired such knowledge*).

(Jurat.)

(Signature.)

Affidavit of Service on a Minor or Lunatic.

(Title of cause.)

(Venue.)

A. B., being duly sworn, says, that he is a clerk in the office of _____, attorney for the plaintiff in the above-entitled action; that he is over _____ years of age; that Y. Z., one of the defendants above named, is a minor under fourteen years of age (*or has been judicially declared to be of unsound mind, and a committee has been duly appointed for him*); that E. F. is his father (*or that E. F., G. H. and J. K. are such committee*). That on the _____ day of _____, 18____, at _____, this deponent served on the said Y. Z. the within summons (and complaint), by delivering to him a copy thereof, and leaving the same with him, and by delivering a copy thereof on the _____ day of _____, 18____, at _____ to the said E. F., the father of said defendant, personally (*or to said E. F., G. H. and J. K., said committee, and each of them personally*), and leaving the same with (him). Deponent further says, that he knows the said Y. Z. so served to be the person mentioned and described in said summons as the defendant therein, and said E. F. to be his father (*or that the said E. F., G. H. and J. K. are the committee appointed for him as aforesaid.*)

(Jurat.)

(Signature.)

Section 3. In case of service by publication. The affidavits on which the plaintiff relies as proof of service by publication must show that the order under which such service was made has been fully complied with. *Hallett v. Righters*, 13 How. 46.

Proof of the publication of the summons may be made by the publisher of the paper in which the publication was made, or by

Printer's affidavit of the publication of a summons.

the printer, or his foreman, or principal clerk. Code, § 138; *Bunce v. Reed*, 16 Barb. 347. The affidavit must show that the affiant is such publisher, printer, foreman, or clerk; that the summons was published in the papers designated in the order once in each week for the full time prescribed therein. *Brisbane v. Peabody*, 3 How. 109. An affidavit must be made showing that a copy of the summons and complaint was deposited in the post-office for transmission to the defendant, and that the postage was paid thereon. It must also show when and where such papers were mailed, and to whom and where directed. Code, § 138.

Proof of personal service out of the State must invariably be furnished by the affidavit of the person making such service, or by the admission of the party served. *Morrell v. Kimball*, 4 Abb. 352; *Thurston v. King*, 1 id. 126. A sheriff's return of a service out of this State is not proof of the fact to which it certifies. *Ib.*

In actions for the recovery of money only, when the summons has been served by publication, under section 135 of the Code, no judgment shall be entered, unless the plaintiff, at the time of making the application for judgment, shall show by affidavit that an attachment has been issued in the action and levied upon property belonging to the defendant, which affidavit shall contain a specific description of such property, and a statement of its value, and shall be attached to and filed with the affidavits of publication. Rule 34, Supreme Court.

Printer's Affidavit of the Publication of a Summons.

(Title of cause.)

(Venue.)

A. B., being duly sworn, says, that he is the printer (or foreman of the printer, etc.) of the _____, a newspaper published in _____, and that the summons in this action, with notice thereto appended, copies whereof are hereto annexed, were published in said paper once in each week for (six) successive weeks, the first publication being on (Monday) the _____ day of _____, 18____, and the last upon (Monday) the _____ day of _____, 18____.

(Jurat.)

(Signature.)

Affidavit of Mailing Summons and Complaint.

(Title of cause.)

(Venue.)

A. B., being duly sworn, says, that he is a clerk in the office of _____, attorney for the plaintiff in this action; that on

Affidavit of substituted service.

the day of , 18 , he deposited a copy of the annexed summons and complaint in this action in the post-office at , directed to , one of the defendants above named (or, who is the president of the Company, defendants above named), at , his place of residence, and prepaid the postage thereon.

*(Jurat.)**(Signature.)**Affidavit of Substituted Service.**(Title of cause.)**(Venue.)*

A. B., being duly sworn, says, that he is the attorney for the plaintiff in this action; that on the day of , 18 , at , in the (city) of , he served the summons in this action, of which a copy is hereto annexed, upon the defendant , by leaving a copy thereof at the residence of the said defendant aforesaid, delivering the same to , whom he knew to be the (wife) of the said defendant, and who received the same; and that deponent left said copy with said . And deponent further says, that on the day of , 18 , at , he put another copy of said summons, properly enveloped and directed to the defendant , at his said place of residence, into the post-office in said town, and paid the postage thereon.

*(Jurat.)**(Signature.)**Affidavit of Substituted Service where Admittance was Denied.**(Title of cause.)**(Venue.)*

A. B., plaintiff's attorney in this action, being duly sworn, says, that on the day of , 18 , at number , in street, in the city of , he served the summons in this action, a copy of which is hereto annexed, upon the defendant , by affixing the same to the (outer) door of said residence, deponent not being able to obtain admittance thereto, nor to find any person of proper age at said residence who would receive the same; and, further, that deponent on the day of , 18 , at , put another copy of said summons, properly enveloped and directed to the defendant at his said place of residence, into the post-office in said city, and paid the postage thereon.

*(Jurat.)**(Signature.)*

Section 4. By written admission. Except under an order for publication, an admission by a defendant of service out of this State is of no avail. *Litchfield v. Burwell*, 5 How. 341; S. C., 1 Code R. N. S. 42; 9 N. Y. Leg. Obs. 182, *ante*. Nor is such

 Admission of service — Proof of signature — Controverting service.

admission valid in any case unless the signature of the defendant is identified. *Ib.* But an irregularity arising from an omission of the verification may be cured by filing an affidavit containing the requisite proof, at any time before a motion to set aside the summons has been made. An admission of service not stating the manner of the service is insufficient. The admission must state that the service was personal by delivery of a copy thereof to him. *Read v. French*, 28 N. Y. (1 Tiff.) 285.

Admission of Service.

I admit due and personal service of the within summons (and complaint) upon me, this day of , 18 , by a delivery of copies thereof to me, at , in the county of , and State of .

Y. Z., *Defendant.*

(*Signature of witness.*)

Proof of Signature.

(*Venue.*)

On this day of , 18 , before me came the above, named , to me personally known to be the person whose name is subscribed to the above admission as witness thereto, who being by me sworn, says, that he resides in , and that on the day of , 18 , and at the place named, he saw the said Y. Z., to him personally known to be the defendant described therein, sign the same. (*Signature of Officer.*)

Section 5. The general requisites and form of proof. There are some general requisites to the valid proof of the service of a summons that are worthy of further notice. Every paper purporting to establish the fact that service has been made must identify the summons, and connect it with the action thereby commenced. It must show that the party on whom service was made was the defendant, and that the manner of the service was according to the requirements of the statute and rules of the court. It must also show the time and place of service, in all cases except in case of service under an order for publication. Code, § 138. All affidavits of service out of the State should be sworn to before the proper officer, and so attested as to be entitled to judicial notice.

Section 6. Controverting service. The defendant may dispute the service of a summons upon him, irrespective of the form of proof by which such service is sought to be substantiated. In no case is the return of a sheriff or an affidavit of service conclusive

When jurisdiction is complete.

upon the defendant; but he may disprove the facts set forth in such affidavit or return, on motion to set aside the return. *Van Rensselaer v. Chadwick*, 7 How. 297; *Litchfield v. Burwell*, 5 id. 341; S. C., 1 Code R. N. S. 42; 9 N. Y. Leg. Obs. 182; *Wallis v. Lott*, 15 How. 537. But the return of a sheriff cannot be impeached collaterally but only by direct proceedings to which the officer is a party, or upon summary application to the court to correct or set aside the return. *Sperling v. Levy*, 1 Daly, 95.

When the sheriff's certificate or affidavit of service is impeached it must be sustained by counter affidavits, or it will be insufficient. *Hunter v. Leslie*, 10 Abb. 260; S. C., 18 How. 347.

ARTICLE X.

WHEN JURISDICTION IS COMPLETE.

Section 1. When service has been made according to law. A court can acquire a limited jurisdiction in an action by the allowance of a provisional remedy. Code, § 139. But jurisdiction does not become complete until the service of a summons in some of the modes prescribed by law, or by the voluntary appearance of the defendant. *Akin v. Albany Northern R. R. Co.*, 14 How. 327; *Kendall v. Washburn*, id. 380; *In re Griswold*, 13 Barb. 413; *O'Hara v. Brophy*, 24 How. 399; *Diefendorf v. Elwood*, 3 id. 285; S. C., 1 Code R. 42; *Williams v. Van Valkenburgh*, 16 How. 144.

Section 2. Laches. It is a well-settled principle, that, if the court has failed to acquire jurisdiction by the service of process, it cannot gain it by any delay on the part of the defendant in raising an objection to the invalidity of the proceedings. Laches cannot confer jurisdiction, and although it may waive an irregularity, it cannot impart vitality to a void judgment. *Titus v. Relyea*, 16 How. 371; S. C., 8 Abb. 177; *Williams v. Van Valkenburgh*, 16 How. 144; *Bulkley v. Bulkley*, 6 Abb. 307; *Peck v. Cook*, 41 Barb. 549; *Fiske v. Anderson*, 33 id. 71; S. C., 12 Abb. 8.

Return of process — Filing papers by sheriff or attorney.

ARTICLE XI.

RETURN OF PROCESS.

Section 1. Mode of return. It is the duty of the sheriff to make a proper return of process. If he does not do so personally, he must at least see that it is done. If he makes a return by mail, he must prepay the postage, whether any money has been advanced for this purpose or not. *Jenkins v. McGill*, 4 How. 205. A return is made by delivering the summons to the party who subscribed it, together with the proof of service, or, if for any reason the service has not been made, with the indorsement of the facts excusing non-service. Either party may compel a return. *Ib.*

Section 2. Compelling return. At any time after the day when it is the duty of the sheriff or other officer to return, deliver or file any process or other paper, by the provisions of the Code of Procedure, any party entitled to have such act done may serve on the officer a notice to return, deliver, or file such process or other paper, as the case may be, within ten days, or show cause, at a special term to be designated in such notice, why an attachment should not issue against him. Rule 10, Supreme Court.

Section 3. Filing papers by sheriff or attorney. The undertakings given upon procuring an order of arrest, an injunction or an attachment, must be forthwith filed with the clerk of the court by the plaintiff's attorney, under the penalty of having the proceedings vacated for irregularity. The attorney is also required to file at the same time the affidavits upon which these provisional remedies have been granted; and also the affidavit upon which an order for the publication of a summons, or an order for substituted service has been granted, together with the order. Rule 5, Supreme Court; Code, § 423.

The sheriff is required to file with the clerk the order or process and original affidavits upon which an order of arrest is made within ten days after the arrest. Rule 6. He may be compelled to perform this duty by proceedings under rule 10.

And it is a general rule of the court that, when any order on a non-enumerated motion is entered, all the papers used on the motion must be filed with the clerk, or the same may be set aside as irregular. Rule 7.

CHAPTER III.

PROCEEDINGS BY THE PLAINTIFF AFTER THE SERVICE OF THE SUMMONS AND BEFORE PLEADING.

ARTICLE I.

SEE THAT THE SUMMONS IS SERVED ON ALL THE PROPER PARTIES.

In every action, the proper service of the process by which it is commenced is one of the most important steps in the proceedings; and the plaintiff should carefully scrutinize the manner in which such service has been made, and guard against any irregularity that may give even a temporary advantage to the adverse party. It is often important that a full and complete service of the summons should be made on each defendant in the action, even where a service on one or more, but not on all, would give the plaintiff power to enter judgment against the joint property of all, in case of a default, or successful termination of the action at the trial. Code, § 136. To see that such service has been made should be one of the first proceedings on the part of the plaintiff. Where mere nominal parties are made defendants, against whom no personal claim is made, the service of the proper notice with the summons is important, and should never be omitted. Code, § 131. Care on the part of the plaintiff, in securing the proper service of the summons and the accompanying notices, if such notices may be necessary or proper, will often avoid serious embarrassment and delay in the conduct of the action, even where no amendment may be absolutely indispensable to the validity of a subsequent judgment. As to the proper parties to be made defendant, see Parties Defendant, *ante*, 120 to 140.

ARTICLE II.

SEE THAT PROVISIONAL REMEDY HAS BEEN EXECUTED.

If a provisional remedy has been allowed in the action, the plaintiff should see that it has been carefully executed. By neglecting this precaution all the advantages arising from a successful prosecution of the action may be lost through a lack of

Procure papers for framing complaint.

control over the person or property of the defendant prior to judgment. Not only is it essential that the provisional remedy should be executed, but the manner in which it has been executed is equally important and worthy of careful scrutiny. If an order of arrest has been allowed, and the defendant has been arrested thereon, and bail is offered for his appearance, the plaintiff should inquire as to the sufficiency of such bail, and guard against a worthless undertaking. Code, § 192. The same precaution is necessary in all actions where a provisional remedy has been allowed, and an undertaking offered or given. Code, §§ 210, 241.

But while the plaintiff should provide that none of his rights are imperiled by any neglect of duty on the part of the sheriff, he should also avoid making the officer his agent by unnecessary interference, as this would be fatal to any claim for damages for misfeasance that otherwise might be enforced against the sheriff or his bondsmen. *Root v. Wagner*, 30 N. Y. (3 Tiff.) 9.

A full discussion of the necessary steps in the enforcement of a provisional remedy may be found in the succeeding chapters in this work.

ARTICLE III.

PROCURE PAPERS FOR FRAMING COMPLAINT.

Where the complaint has not been served with the summons, the plaintiff may desire to obtain more accurate information of matters on which to frame his complaint, from books or papers under the control of the defendant. If an inspection of such books or papers is absolutely necessary before the plaintiff can intelligently frame his complaint, an order for a discovery may be obtained either in pursuance of the provisions of the Revised Statutes, or of the Code. 2 R. S. 199 (207), § 21, Edm. ed.; 3 R. S. (5th ed.) 293, §§ 60, 61, 62; 4 Edmonds' Statutes, 550; Laws of 1841, ch. 38; Code, § 388; Rule 18, Supreme Court. But the court will not grant this order unless the plaintiff can clearly establish a right to the remedy. When this can be done the plaintiff should prepare his petition and make an application for an inspection under rule 19 of the supreme court. See *Discovery of Books and Papers*. See *Hoyt v. American Exchange Bank*, 8 How. 89; S. C., 1 Duer, 652; *Thompson v. Erie Railroad Company*, 9 Abb. N. S. 212, 230; *Morrison v.*

Examination of parties — Serve the complaint — File all papers.

Sturges, 26 How. 177; *Julio v. Ingalls*, 17 Abb. 448, note; *Walker v. Granite Bank*, 19 Abb. 111; S. C., 44 Barb. 39.

ARTICLE IV.

EXAMINATION OF PARTIES.

Either party may be compelled to submit to an examination before the trial, or even issue joined, for the purpose of disclosing matter material in aid of the prosecution or defense. Code, § 391. Whenever the plaintiff shall find it necessary to examine the defendant before pleading, he should prepare an affidavit disclosing the nature of the discovery sought, and how the same is material to the framing of his complaint. Code, § 391. Rule 21, Supreme Court. The defendant may be compelled to appear before a judge of the court, or a county judge, and testify in relation to the facts sought to be discovered under the penalty of a commitment as for a contempt, and a forfeiture of all rights to defend in the action. Code, §§ 392, 394. See *Examination of Parties*.

ARTICLE V.

SERVE THE COMPLAINT.

Where no complaint was served with the summons, and the defendant has appeared and demanded the same in writing, the plaintiff must serve the complaint within twenty days from the service of the demand, if the same was made personally; or if the demand was served by mail, within forty days from such service. Code, §§ 130, 412. The complaint may be served personally or by mail, and need not be served until the last day allowed for such service. If the time for service is insufficient, it may be enlarged on application to the court. Code, § 405. See *ante*, 504.

ARTICLE VI.

FILE ALL PAPERS.

If a provisional remedy has been allowed in the action, the plaintiff's attorney should forthwith file with the clerk all undertakings given upon procuring the order, as well as the

File all papers.

affidavits upon which the allowance was based. The undertakings should have indorsed upon them the approval of the justice or judge by whom they were taken. Rule 5, Supreme Court. *Newall v. Doran*, 21 How. 427; *Leffingwell v. Chave*, 19 id. 54; S. C., 10 Abb. 472; 5 Bosw. 703; *Brash v. Wielarsky*, 36 How. 253; Code, §§ 222, 343, 423. So when any order on a non-enumerated motion is entered, all the papers used on the motion must be filed with the clerk or the order may be set aside as irregular. Rule 7, Supreme Court, and see Rule 47, id. There is one exception to the general rule, that it is the duty of the plaintiff's attorney to file all affidavits upon which a provisional remedy is based, and this exception requires the sheriff to file with the clerk, the order or process, and original affidavits on which an arrest is made, within ten days from the time of the arrest. Rule 6, Supreme Court.

But the attorney should not omit to see that the sheriff has performed his duty in this respect, and in case of neglect should take such steps as he may deem advisable to compel the sheriff to file the order and affidavits. See Rule 10, Supreme Court.

In actions relating to real property, the filing of a notice of *lis pendens* is not only proper but almost indispensable. In actions for the foreclosure of a mortgage, the Code requires that the notice shall be filed at least twenty days before judgment, and the careful practitioner, in all actions relating to real property, will file this notice with the complaint at the earliest day possible. Code, § 132. See Notice of *lis pendens*, ante, 494.

Although the Code requires that the "summons and several pleadings in an action shall be filed with the clerk within ten days after the service thereof, respectively," this rule is seldom observed in general practice. It is certainly advisable to comply with the directions of the Code in all cases, although in this instance the penalty extends to an order only, requiring the plaintiff to file these papers within a time specified, or they will be deemed abandoned. Code, § 416.

ARTICLE VII.

COMPEL RETURN AND FILING OF PAPERS BY THE SHERIFF.

Whenever the sheriff or other officer neglects to return, deliver, or file any process or other paper within the time fixed by the Code for the performance of this duty, the plaintiff should proceed at once to compel the officer to do his duty by a notice under rule 10 of the supreme court. The sheriff may demand his fees before he executes a process, but, if he does not insist upon his right, he cannot make the payment a condition precedent to his making a return after the service. *Wait v. Schoonmaker*, 15 How. 460.

But where an order has been made staying proceedings in an action, after the service of the notice to make a return within ten days, as provided by rule 10, it is the duty of the plaintiff's attorney, if he desires to bring the sheriff into contempt, to furnish him with proof that the stay is no longer in force. If the stay continues in force up to the expiration of the ten days, the notice is a nullity, and a new notice should be served after such stay is vacated, before proceedings can be maintained against the sheriff for contempt in not making a return pursuant to the notice. *People v. Carnley*, 3 Abb. 215. But, in all cases, the *onus* of excusing a default lies upon the sheriff. *Wilson v. Wright*, 9 How. 459; Code, § 419.

CHAPTER IV.

PROCEEDINGS BY DEFENDANT AFTER THE SERVICE OF THE SUMMONS, AND BEFORE PLEADING.

ARTICLE I.

APPEARANCE.

Section 1. What appearance is. Under the ancient constitution of the English courts, every suitor was obliged to appear *in person* to prosecute or defend his suit, unless by special license under the king's letters patent. 3 Bla. Com. 25. The primitive feature of an actual and personal *appearance* of the parties themselves in court gave place at an early period to the more convenient practice of appearing *by attorney*; and even the *personal* appearance of the attorney was, in turn, succeeded by a *constructive* appearance, and under this legal fiction parties still appear in court to prosecute or defend actions or proceedings.

Under the practice prior to the Code, an action was commenced by the *appearance* of the defendant in court in compliance with the plaintiff's process. If the defendant was served with bailable process, this appearance was *actual*, as by coming into court under arrest; or *constructive*, by the medium of an undertaking of bail, whereby certain persons agree that, if the defendant be defeated in the action, he shall satisfy the costs and judgment, or render himself into custody, or that they will do it for him.

But if the defendant was served with a non-bailable process, his appearance was usually indorsed on the writ in the following form: "I promise to appear at the return of the within writ, and pray the court to enter my appearance accordingly."

In either case the entry, by the clerk, of this appearance on the records of the court, completed the first steps in the action and the defendant was then fairly before the court.

The Code has not changed, in any essential particular, the general features of what formally constituted an appearance under the former practice. The chief distinction between the two systems lies in the effect rather than in the form of an

What appearance is.

appearance. Under the former system, an appearance by the defendant was indispensable to a valid judgment, as it was this that gave the court jurisdiction of the person, and in cases where the appearance of the defendant could not be compelled by summons, the court on proof of such fact would issue a *writ of distringas* to compel such appearance. Under the Code it is the service of a summons only that can confer jurisdiction over the person of the defendant, and when this has been done no appearance is necessary, as a valid judgment can be entered by the plaintiff on proof of the service, and the default of the defendant. Code, § 127. See *Carpenter v. New York & New Haven R. R. Co.*, 11 How. 481.

Service of notice of appearance, or of retainer generally, by an attorney for the defendant, will in all cases be deemed an appearance. And the plaintiff on filing such notice, at any time thereafter, with proof of service thereof, may have the appearance of the defendant entered as of the time when such notice was served. Rule 14, Supreme Court.

Any act by which a party to an action submits himself to the jurisdiction of a court is an appearance. *Cooley v. Lawrence*, 12 How. 176; S. C., 5 Duer, 605. This act may consist in the service of a notice of motion signed by an "attorney for the defendant" (*Kelsey v. Covert*, 15 How. 92; S. C., 6 Abb. 336, *n*; *Baxter v. Arnold*, 9 How. 445); or of a notice of bail (*Quick v. Merrill*, 3 Caines, 133; *M'Kenster v. Van Zandt*, 1 Wend. 1); or an order extending the time to answer (*Quin v. Tilton*, 2 Duer, 648; *Ayres v. Western R. R. Corporation*, 48 Barb. 132; S. C., 32 How. 351); or a notice of a motion to discharge an order of arrest. *Dart v. Arnis*, 19 How. 429.

An unqualified submission to the jurisdiction of the court is termed a general appearance, to distinguish it from an appearance under protest, as it were, for the sole purpose of objecting to the jurisdiction of the court. This latter limited appearance may become general, notwithstanding the objection to the jurisdiction of the court, if the party so appearing claims any right beyond that of merely objecting. *Mahaney v. Penman*, 4 Duer, 603; S. C., 1 Abb. 34; *Ballard v. Burrowes*, 2 Rob. 206; *Sullivan v. Frazee*, 4 id. 616; *Freeman v. Young*, 3 id. 666.

An appearance is *entered* when the notice of retainer with proof of service has been filed with the clerk, or the defendant has appeared in open court claiming any right in the action.

How and when to appear.

Field v. Blair, 1 Code R. N. S. 292; S. C. affirmed, id. 461; *Cooley v. Lawrence*, 12 How. 176; S. C., 5 Duer, 605.

Section 2. How and when to appear. Every person of full age and sound mind may appear in any civil action by attorney; or may, at his election, prosecute or defend in person. 2 R. S. 276, (285), Edm. ed.; 3 R. S. (5th ed.) 467, § 20. While under this provision of the statute no doubt can exist as to the right of the defendant to appear and defend in person, it is not so clear that the plaintiff can appear in person and prosecute the action. The Code requires that every action shall be commenced by the service of a summons. Code, § 127. And it also requires that this summons shall be subscribed by an attorney, and that the answer to the complaint shall be served upon the person whose name is so subscribed. Code, § 128. This requirement as to the subscription of the summons was added by the amendment of 1870, and must be supposed to have been made for some purpose. It is also provided by statute, that no person shall be permitted to appear on the record in any civil cause in person, while he has an attorney or solicitor in such cause. 2 R. S. 276 (285), § 11, Edm. ed.; 1 R. L. 416, § 1; 3 R. S. (5th ed.) 467, § 20. As the plaintiff must appear in the summons by attorney, and cannot at the same time appear in person, it is clear that there can be no appearance by him, in person, in the action, unless he is himself an attorney. The right of any person to prosecute in person seems, however, to be recognized by the rules of court. See Rule 13, Supreme Court.

When an infant is a party he must appear by guardian. Code, § 115. And where the infant is plaintiff, the guardian must be appointed before the action is commenced. *Freyberg v. Pelerin*, 24 How. 202; *Hoftailing v. Teal*, 11 id. 188; *Hill v. Thatcher*, 2 Code R. 3; S. C., 3 How. 407. After an answer has been served, it is too late to move to set aside the plaintiff's proceedings, on the ground that the action is prosecuted without the appointment of a guardian. *Parks v. Parks*, 19 Abb. 161; *Fellows v. Niver*, 18 Wend. 563. It is not necessary for an infant wife to appear by guardian, when she joins with her husband in an action, unless she sues to recover her separate property. *Cook v. Rawdon*, 6 How. 233; S. C., 1 Code R. N. S. 382.

A guardian must in all cases be appointed for an infant when defendant in an action. *McMurray v. McMurray*, 9 Abb. N. S. 315; S. C., 41 How. 41; 60 Barb. 117; *Kellog v. Klock*, 2 Code

General appearance and demand of copy-complaint.

R. 28; *Fairweather v. Satterly*, 7 Rob. 546. But the guardian cannot be appointed before the infant has been served with a summons. *Glover v. Haws*, 19 Abb. 161, note. In an action against an infant for a tort, where he appears and answers by an attorney, and a trial and verdict is had, the plaintiff cannot have a guardian appointed for the infant, as of the time of his appearance; although he may have the defendant's appearance by attorney struck out, and all subsequent proceedings vacated. *Boylan v. McAvoy*, 29 How. 278.

A lunatic or idiot should appear by his committee, and if he is also an infant, then by the guardian *ad litem* appointed at the request of such committee or general guardian. *Rogers v. McLean*, 11 Abb. 440; S. C. affirmed, 34 N. Y. (7 Tiff.) 536; 31 How. 279; *Jelly v. Elliott*, 1 Cart. (Ind.) 119.

General Appearance and demand of Copy-complaint.

(Title of cause).

SIR: Please take notice, that I am retained by and appear as attorney for the defendant in this action, and demand that a copy of the complaint be served on me at my office, No , street in the city of

O. P.,

Attorney for the Defendant.

No , street,

To J. A., Esq.,

Plaintiff's Attorney.

Limited Appearance for Special Purpose.

(Title of cause.)

SIR: Please take notice, that I am retained by and appear as attorney for the defendant in this action, for the purpose of moving to vacate the attachment issued therein (or other special purpose).

O. P.,

Attorney for defendants for the purposes of this motion only.

(Address)

To J. A., Esq.,

Plaintiff's Attorney.

Section 3. Right to appear. The right of a defendant to appear in any action depends upon the character of the claim made against him in the complaint, and the character of the relief demanded, rather than on the will of the plaintiff. Thus, a person named as a defendant, and against whom a judgment is prayed by the complaint, has a right to appear and answer,

Effect of appearance — What irregularities are waived by appearance.

although not served with a summons, and although the defense interposed is infancy. *Higgins v. Freeman*, 2 Duer, 650; *Wellington v. Classon*, 18 How. 10; S. C., 9 Abb. 175; *Rogers v. McLane*, 11 id. 440, 455.

But one of several defendants, who has not been served with a summons or complaint, cannot voluntarily appear uninvited and unwelcome, and intrude himself upon the court and the plaintiff unless he has some right to protect which renders such appearance necessary. *Tracy v. Reynolds*, 7 How. 327; *Wellington v. Classon*, 18 id. 10; S. C., 9 Abb. 175; *Waterbury Manufacturing Company v. Krouse*, 1 Hilt. 560; S. C., 9 Abb. 175, note.

Section 4. Effect of appearance. A voluntary appearance of a defendant is equivalent to the personal service of a summons upon him. Code, § 139; and, after such appearance, the court acquires full jurisdiction for all purposes whatsoever. A general appearance is an admission on the part of the defendant, that he has been regularly brought into court; that the summons and its service were regular; and that the court into which he is brought has jurisdiction of his person. *Carpenter v. New York and New Haven Railroad Company*, 11 How. 481; *Le Sage v. Great Western Railway Company*, 1 Daly, 306; *Murray v. Vanderbilt*, 39 Barb. 140; *Sprague v. Irwin*, 27 How. 51; *Dix v. Palmer*, 5 id. 233; S. C., 3 Code R. 214.

By appearing in an action the defendant acquires the right to a notice of every subsequent step in the action, and even if he has no defense to interpose, he acquires the substantial advantage of supervising all the proceedings of his adversary. In an action on contract for money only, when the complaint is unverified, he is entitled to five days' notice of the assessment of damages before the clerk. In actions commenced by a summons under the second subdivision of section 129, if the defendant has appeared before the time for answering has expired, he is entitled to eight days' notice of the time and place of application to the court for the relief demanded in the complaint. Code, § 246.

In all cases where a notice of appearance has been given, the defendant is entitled to due notice of the taxation of costs. Code, § 311; *Elson v. New York Equitable Insurance Company*, 2 Code R. 30.

Section 5. What irregularities are waived by appearance. A general appearance in an action waives all irregularities in the

What defects are not waived by appearance.

summons and its service, and even waives the want of any service whatever. *Murray v. Vanderbilt*, 39 Barb. 140; *Gossling v. Broach*, 1 Hilt. 49; *Sprague v. Irwin*, 27 How. 51; *Flynn v. Hudson River Railroad Company*, 6 id. 308; S. C., 10 N. Y. Leg. Obs. 158; *Dix v. Palmer*, 5 How. 233; S. C., 3 Code R. 214.

It also waives all irregularities in affidavits in an action of replevin; so in actions for a penalty created or given by statute the omission of the special indorsement will be cured by a general appearance. *Hyde v. Patterson*, 1 Abb. 248; *Sprague v. Irwin*, 27 How. 51.

A general appearance also waives all objection to jurisdiction arising from the service of process outside of the limits of the jurisdiction of the court. *Smith v. Dipeer*, 2 Code R. 70.

Section 6. What defects are not waived by appearance. There may be some defects in the proceedings of the plaintiff that no appearance by the defendant can waive. These are defects of a more serious nature than the mere informalities that are usually comprehended in the term "irregularities."

Thus, a general appearance by the defendant will waive a defect in the form of a summons, or an irregularity in its mode of service, or a defect arising from a variance between the summons and complaint, if both are served together; but it will not waive a defect arising from a variance between such process and pleading when separately served. *Brown v. Eaton*, 37 How. 325; *Voorhies v. Scofield*, 7 id. 51; *Shafer v. Humphrey*, 15 id. 564; *Webb v. Mott*, 6 id. 439. And it is a general rule that, while a general appearance will waive any irregularity that has preceded such appearance, it will not waive an irregularity not apparent or in existence at that time. *Ib.* But waiver by appearance does not depend upon the knowledge, or want of knowledge, of the party so appearing. It depends rather upon the existence of the defect prior to such appearance. *Coppernoll v. Ketcham*, 56 Barb. 111; *Wright v. Jeffrey*, 5 Cow. 15; *Pixley v. Winchell*, 7 id. 366.

No appearance by the defendant can waive a jurisdictional defect relating to the subject-matter of the action. *Harriott v. New Jersey Railroad Company*, 2 Hilt. 262; S. C., 8 Abb. 284. While consent may confer jurisdiction over the persons of the defendants, it cannot confer jurisdiction over the subject-matter. *King v. Poole*, 36 Barb. 242; *Dudley v. Mayhew*, 3 N. Y. (3 Comst.) 9; *Coffin v. Tracy*, 3 Caines, 129.

Examination of papers served.

Thus, if parties by consent submit a cause of action to a State court for adjudication, when the subject of the action is within the exclusive jurisdiction of the federal courts, as, in case of a cause of action arising from an infringement of a patent right, such submission and consent will not give such State court jurisdiction. *Ib.* ; *ante*, 45.

And, in all cases where it is said that a general appearance waives even an objection to void process, it must not be understood that such appearance renders a void process valid, but that it renders all process unnecessary. Code, § 139 ; *Carpenter v. New York & New Haven Railroad Company*, 11 How. 481.

A restricted or limited appearance, for the sole purpose of objecting to the irregularities in the proceedings, on the part of the plaintiff, cannot be construed as a waiver of any defect therein. *Seymour v. Judd*, 2 N. Y. (2 Comst.) 464 ; *Ballard v. Burrowes*, 2 Rob. 206. But, on such appearance, the notice of motion should be signed by the moving party as "attorney for this motion only," and the motion being made, the defendant should withdraw. See *Mahaney v. Penman*, 1 Abb. 34 ; S. C., 4 Duer, 603 ; *Freeman v. Young*, 3 Rob. 666 ; *Cooley v. Lawrence*, 5 Duer, 605 ; S. C., 12 How. 176. But if the objection is taken by an answer which simply sets up the lack of jurisdiction, the mere subscription to the pleading will not be such an appearance as to waive any objection to jurisdiction. *Sullivan v. Frazee*, 4 Rob. 616 ; *Avery v. Slack*, 17 Wend. 85.

ARTICLE II.

EXAMINATION OF PAPERS SERVED.

Section 1. Defects in the summons or its service. The first proceeding on the part of the defendant, after he has been served with a summons, should be to carefully examine all papers served, and satisfy himself as to the regularity of every step in the plaintiff's proceedings. This must be done before he waives, by a general appearance, any right to object to defects in the form or the manner of service. This examination should not cease with the discovery of one or more defects. It frequently happens that the careful practitioner can detect several irregularities in the same proceedings, and at his option, can elect between the several remedies that would

 Notice of motion to set aside summons.

reach these defects; and the importance of a careful scrutiny, that shall include every error, will be readily seen in connection with the rule of practice, that the plaintiff must include in his motion a demand for all the relief to which he is entitled at the time of making the motion, or he will waive all defects previously existing, and not so included. *Desmond v. Wolf*, 1 Code R. 49; S. C., 6 N. Y. Leg. Obs. 389; *Mills v. Thursby*, 11 How. 114. See *People v. M' Cumber*, 18 N. Y. (4 Smith) 315.

Notice of Motion to set aside Summons.

(Title of cause.)

SIR: Take notice, that I shall move this court at a special term, to be held at the _____, in the _____, on the _____ day of _____, 18____, to set aside the summons and all subsequent proceedings in this action, on the ground that (state grounds of motion), with costs, or for such other or further relief as to the court may seem just.

A. Z.,

*Attorney for defendants for the purpose of
this motion only.*

To B. Y.,

Plaintiff's Attorney.

(Address.)

Section 2. Authority of plaintiff's attorney. As a general rule, when an attorney appears for a plaintiff in an action, a retainer will be presumed, and the authority of the attorney to appear and represent his client will pass undisputed. *Hamilton v. Wright*, 37 N. Y. (10 Tiff.) 502; S. C., 5 Trans. App. 1. And where there is nothing in the conduct or character of the proceedings indicative of fraud, the court will not, in the preliminary stages of a suit, compel a respectable and responsible attorney to show his authority. *Republic of Mexico v. Arrangois*, 1 Abb. 437; S. C. affirmed, 5 Duer, 643. See S. C. again, 11 How. 1; 3 Abb. 470. But when there are numerous parties plaintiff in an action, many of whom cannot be presumed to be known to the defendant, and whose existence even is uncertain, the defendant may demand, not only the authority of the attorney to appear for the plaintiffs, but also that he shall disclose the full christian name of such plaintiffs respectively, and even the number of the street of the city where they reside and their several occupations. *Ninety-nine Plaintiffs v. Vanderbilt*, 1 Abb. 193; S. C., 4 Duer, 632; 10 How. 324. It may be doubted if a defendant can, except in actions of ejectment, demand the production of the authority of the plaintiff as a

Authority of plaintiff's attorney.

matter of strict right. It is rather an appeal to the discretion of the court. *Board of Commissioners of Excise v. Purdy*, 22 How. 506; S. C., 36 Barb. 266; 13 Abb. 434; *Thayer v. Lewis*, 4 Denio, 269; *M'Alexander v. Wright*, 3 Monroe, 189. See *Clark v. Holliday*, 9 Miss. 711; *Gillespie's Case*, 3 Yerger, 325. It is not often that, in addition to the production of the plaintiff's authority, the court will require the residence and occupation of the party plaintiff. Usually this requirement is confined to *qui tam* actions and actions of ejectment, because it is only in such cases that the defendant is generally ignorant of the name and occupation of the plaintiff. The order was, however, made in the case of an assault, where the defendant could not ascertain who the plaintiff was. *Johnson v. Birley*, 5 Barn. and Ald. 540; S. C., 1 Dow. and Ryl. 174. And a similar order was made in an action for libel, brought by three plaintiffs who were unknown to the defendant. *Worton v. Smith*, 6 Moore, 110. So where an infant sued by guardian, the attorney was required to give the guardian's residence or abode. *Tomlin v. Brookes*, 1 Wils. 246. The order was refused when the object of the application was to obtain the arrest of the plaintiff. *Harris v. Holler*, 7 D. and L. 319. And also where the application was delayed until after verdict. *Hooper v. Harcourt*, 1 H. Bla. 534. By the English statutes a refusal to comply with the order is a contempt of court. An order staying proceedings until the order is complied with will, however, be sufficient to enforce compliance, or at least protect the defendant's rights. In actions of ejectment the statute requires that the attorney shall appear by virtue of a written authority. In actions of this character a demand for the production of this authority will always be proper. *McDermott v. Davison*, 1 How. 194.

The statute expressly provides that the defendant may, at any time before pleading, apply to the court or a judge, to compel the attorney for the plaintiff to produce his authority for commencing the action. The application must be accompanied by an affidavit of the defendant, to the effect that he has not been served with any proof of the authority of the attorney to use the names of the plaintiff in the action. Upon this application the court must grant an order for the production of such authority, and for a stay of all proceedings until the same shall be produced. 2 R. S. 305 (314), § 19; *Harris v. Mason*, 10 Wend. 568. This statute also applies to suits under the Code to recover

Affidavit on which to move for an order to produce authority.

land. *Howard v. Howard*, 11 How. 80. But in *qui tam* actions, the defendant has no right to object that the action is brought in the name of the nominal plaintiff without his consent. This objection can be raised by such plaintiff alone. *Board of Commissioners of Excise v. Purdy*, 36 Barb. 266; S. C., 13 Abb. 434; 22 How. 506; *Thayer v. Lewis*, 4 Denio, 269; *Pomroy v. Sperry*, 16 How. 211.

Affidavit on which to move for an order to produce authority.

(Title of cause.)

(Venue.)

Y. Z., one the defendants in this action, being duly sworn, says, that he has not, nor has his attorney, been served with proof in any way of the authority of the attorney for the plaintiff in this action to sue in the name of the said plaintiff, stated in the summons and complaint.

(Jurat.)

(Signature.)

Order to Produce Authority.

(Title of cause.)

(Caption.)

On reading and filing the annexed affidavit of Y. Z., and on motion of R. S., his attorney.

ORDERED: That O. P., acting as attorney for the plaintiff in this cause, do forthwith produce to this court, at _____, on the _____ day of _____, his authority for commencing this action in the name of the plaintiff, and all the proceedings in the action are hereby stayed until the same be produced.

Authority of Plaintiff's Attorney.

I hereby request and authorize O. P., of _____, as my attorney, to bring an action in the courts of the State of New York, in my name, to recover possession of (*designate the real property in question*), with full power to prosecute the same.

(Date.)

(Signature.)

Attorney's Affidavit of Authority.

(Title of cause.)

(Venue.)

O. P., of _____, attorney at law, being duly sworn, says, that he has written authority from A. B., the plaintiff in this action, to bring such action, of which authority the annexed is a copy; that the said writing was duly signed and delivered to this deponent by the plaintiff (*or set forth how the same came into his possession*).

(Jurat.)

(Signature.)

Notice of attorney's authority — Removal to United States court.

Notice of Attorney's Authority.

(*Title of cause.*)

SIR: *Take notice*, that the within is a copy of the affidavit of the plaintiff's attorney herein, showing his authority to bring this action.

(*Date.*)

(*Signature.*)

To R. S., Esq.,

Defendant's Attorney.

Section 3. Removal to United States court. In actions where the State and federal courts have concurrent jurisdiction, the defendant may, at the time of entering an appearance in a State court, file a petition for the removal of the cause for trial into the next United States circuit court. This right is granted only in actions against aliens, or by a citizen of one State against a citizen of another; and only when the value of the matter in dispute exceeds \$500. See Removal to United States Courts, *ante*, 266 to 278. Before making the application, the defendant's attorney should serve a notice of retainer, file and enter the same in the manner prescribed by rule 14 of the supreme court, and at the same time file his petition for a removal of the cause. He may then apply to the court at special term for an order of removal. *Bristol v. Chapman*, 34 How. 140. Notice must be given of the application. *Ib.*

Section 4. Removal to other courts. Actions commenced in the county court may, before trial, be removed into the supreme court on special motion and for good cause shown, *ante*, 399, 400. On such removal being made the supreme court has power to change the venue or place of trial. Laws of 1870, ch. 467.

Whenever the right to remove the action to another court exists, the expediency of such a course should receive a careful consideration before it is too late to profit by it.

ARTICLE III.

SETTING ASIDE PROVISIONAL REMEDY.

Section 1. Discharge from arrest. If the defendant has been arrested in a civil action he may, at any time before judgment, move to vacate the order or reduce the amount of bail. Code, § 204. If the application is made to the judge who granted the order, the motion may be *ex parte*, and at chambers. Code, § 324. In other cases it must be on eight days' notice. Code,

Vacating attachment — Dissolving injunction — Return of goods in replevin.

§ 402. As to the practice in procuring a discharge from arrest, see Arrest and Bail. Code, §§ 204, 205.

The neglect of the plaintiff's attorney to file the undertaking upon which the order was granted, with the approval of the judge or justice taking the same properly indorsed upon it, will be a sufficient ground for making a motion to vacate the order. Rule 5, Supreme Court; *Newell v. Doran*, 21 How. 427.

Section 2. Vacating attachment. Whenever a warrant of attachment has been improperly issued against the property of the defendant, he should move at the earliest opportunity to discharge the attachment. If the defects in the plaintiff's proceedings amount to an irregularity only, delay will be fatal to the motion. *Lawrence v. Jones*, 15 Abb. 110. See *Strong v. Strong*, 4 Rob. 621; S. C., 1 Abb. N. S. 233. But the rule that a motion to discharge an attachment, founded upon an alleged irregularity, must be made at the earliest opportunity, does not apply to motions for relief affecting a substantial right. *Bowen v. First National Bank of Medina*, 34 How. 408; *Swezey v. Bartlett*, 3 Abb. N. S. 444.

Section 3. Dissolving injunction. An injunction may be dissolved either before or after answering, and at any time before trial. The application may be made upon the complaint and the affidavit on which the injunction was granted, or upon affidavits on the part of the defendant. Code, § 225. Whenever an injunction is working, or is liable to work, serious injury to the property or business of the defendant, and immediate relief is indispensable to prevent great loss, an immediate application should be made to the court or judge for an order dissolving the injunction. The motion may be made upon an answer denying the equities of the complaint, or upon affidavits alleging a disregard of the requirements of rule 5 of the supreme court. *Secor v. Weed*, 7 Rob. 67; *Johnson v. Casey*, 28 How. 492; S. C., 3 Rob. 710. See Injunction.

Section 4. Return of goods in replevin. Where the goods of the defendant have been taken in an action of replevin, the defendant may require their return to him at any time within three days from the taking of the goods and the service of the notice upon the defendant. Code, § 211. If the defendant elects to claim a return of his goods, he should prepare his undertaking, and make his demand without delay. For the practice in such cases see Replevin, *post*.

ARTICLE IV.

GENERAL PRELIMINARIES.

Section 1. Demand of copy of complaint. The defendant being satisfied that all the precautionary measures necessary to protect his rights have been taken, his next step in the action should be to demand a copy of the complaint if it has not already been served. This demand must be made within twenty days from the personal service of the summons. Code, § 130. The demand must be made in writing, and generally is included in the notice of appearance or retainer. See *Walsh v. Kursheedt*, 8 Abb. 418. If the demand is served personally, the plaintiff has twenty days in which to serve his complaint; but if service is made by mail, double time must be allowed. Code, § 412. See Demand of Complaint, *ante*, 503 to 506.

Section 2. Dismissal for non-service. If the plaintiff neglects to serve the complaint within the proper time, the defendant should move for a dismissal of the complaint with costs under section 274 of the Code. The effect of non-service of the complaint after due demand has been discussed in connection with the summons. The practice upon a motion to obtain a dismissal of the complaint will be discussed in a subsequent chapter.

Section 3. Guardian for infant defendant. Whenever an action is commenced against an infant, a guardian *ad litem* must in all cases be appointed before answering. Code, § 115; *Kellogg v. Klock*, 2 Code R. 29; *Fairweather v. Satterly*, 7 Rob. 546; *McMurray v. McMurray*, 9 Abb. N. S. 315. The infant upon whom a summons has been served may, if he chooses, appear and answer in person, and allow judgment to be entered and execution to be issued against him. But he cannot, by any participation in the proceedings, so far waive the defect in the manner of his appearance as to bind himself by his answer and the trial under it if he elects not to be bound. *Boyle v. M'Avoy*, 29 How. 278. The rule requiring the appointment of a guardian has its foundation in the want of legal capacity in the infant to perform a valid act in the conduct of his defense, upon the ground of a presumed want of understanding. *Kellogg v. Klock*, 2 Code R. 29. As he can perform no valid act, he can make no valid waiver, and a judgment rendered against him

before the appointment of a guardian *ad litem* may be set aside whether the cause of action arose on contract or was founded in tort. The application to vacate the judgment ought, however, to be made within two years after the entry of the judgment, or after the disability has ceased. *Fairweather v. Satterly*, 7 Rob. 546; *McMurray v. McMurray*, 9 Abb. N. S. 315; *Boylen v. M'Avoy*, 29 How. 278; *Camp v. Bennett*, 16 Wend. 48; *Gosling v. Acker*, 2 Hill, 391; *De Witt v. Post*, 11 Johns. 460.

Application for the appointment of a guardian *ad litem* may be made to the court in which the action is prosecuted, to a judge thereof, or a county judge. Code, § 115. The application should not be made until the action has been commenced by the service of a summons. *Glover v. Haws*, 19 Abb. 161, *n*. If the application is made within twenty days after the service of the summons, it must be made by the infant himself, if of the age of fourteen years or over; but, if he be under that age and he neglects to so apply, then the application may be made by any other party to the action, or by a relative or friend of the infant. Code, § 116. This provision of the Code was intended for the benefit and protection of the infant, to secure him the opportunity of having a guardian of his own selection by giving him twenty days after the service of the summons, in which no other person could apply. After that time the relative or friend of the infant may make the application, but, until such application is made, the infant is still at liberty to apply. *McConnell v. Adams*, 1 Code R. N. S. 114; S. C., 3 Sandf. 728. No guardian can be appointed for an infant over fourteen years of age without the infant's consent, and, when the application is made on the infant's own petition, the court must still be satisfied that the nomination is voluntary. *E. B. v. E. C. B.*, 28 Barb. 299; S. C., 8 Abb. 44. When the application is not made by the infant, notice must be first given to his general or testamentary guardian if he has one within the State, or, if he has none, then to the infant himself if over fourteen years of age, or if under that age and within the State, to the person with whom such infant resides. And in actions for the partition of real property or for the foreclosure of a mortgage or other instrument, when an infant defendant resides out of this State, or is temporarily absent therefrom, the plaintiff may apply to the court in which the action is pending, at any special term, and will be entitled to an order designating some suitable person to be the guardian

Guardian for infant defendant.

for the infant defendant, for the purposes of the action, unless the infant or some one in his behalf, within a number of days after the service of a copy of the order, which number of days shall be specified in the said order, shall procure to be appointed a guardian for the said infant, and the court shall give special directions in the order for the manner of the service thereof, which may be upon the infant.

And in case an infant defendant, having an interest in the event of the action, shall reside in any State with which there shall not be a regular communication by mail, on such fact satisfactorily appearing to the court, the court may appoint a guardian *ad litem* for such absent infant party, for the purpose of protecting the right of such infant in said action, and on such guardian *ad litem* process, pleadings and notices in the action may be served in the like manner as upon a party residing in this State. Code, § 116.

No person will be appointed guardian *ad litem*, either on the application of the infant or otherwise, unless he be the general guardian of such infant, or is fully competent to understand and protect the rights of the infant, and who has no interests adverse to that of the infant, and is not connected in business with the attorney or counsel of the adverse party. And no person will be appointed such guardian who is not shown by affidavit to be of sufficient ability to answer to the infant for any damage which may be sustained by reason of his negligence or misconduct in the defense or prosecution of the suit. Rule 61, Supreme Court. It is the duty of every attorney or officer of the court to act as the guardian of an infant defendant in any suit or proceeding against him, whenever appointed for that purpose by an order of the supreme court. And it is the duty of such guardian to examine into the circumstances of the case, so far as to enable him to make the proper defense when necessary for the protection of the rights of the infant. He is entitled to such compensation for his services as the court may deem reasonable. But no order allowing compensation to guardians *ad litem* will be made, except upon an affidavit to be made by such guardian, if an attorney of the court, or, if otherwise, upon the affidavit of the attorney who has acted in the matter in behalf of such guardian, showing that he has examined into the circumstances of the case, and has, to the best of his ability, made himself acquainted with the rights of his ward, and that such guardian has

Petition for the appointment of a guardian for an infant defendant.

taken all the steps necessary for the protection of such rights, to the best of his knowledge, and as he believes, stating what has been done by him for the purpose of ascertaining the rights of his ward. Rule 62, Supreme Court.

No guardian *ad litem* for an infant party, unless he has given security to the infant according to law, shall, as such guardian, receive any money or property belonging to such infant, or which may be awarded to him in the suit, except such costs and expenses as may be allowed by the court to the guardian out of the fund, or recovered by the infant in the suit. Rule 63, Supreme Court.

Petition for the Appointment of a guardian for an Infant Defendant. (By Infant.)

(Title of cause.)

To the Hon. _____, one of the justices of the court.

The petition of Y. Z., one of the defendants above named, respectfully shows:

I. That an action has been commenced against your petitioner in this court for (*state object of the action*).

II. That your petitioner is an infant of the age of _____ years, on the _____ day of _____ last, and resides with _____ at _____, and that _____ is his general guardian.

III. That twenty days have not elapsed since the service of the summons upon the petitioner. Wherefore your petitioner asks that G. H. may be appointed his guardian *ad litem*, to appear and defend said action in his behalf.

(Signature.)

For the form of the *verification* by the infant; the *consent* by the proposed guardian, and the *affidavit* of competency, see *ante*, 486 to 490.

Petition by Friend of Infant Defendant.

(Title of cause.)

To the Hon. _____, one of the justices of the court.

The petition of C. D. respectfully shows:

I. That the above-entitled action has been commenced by the service of a summons upon Y. Z. (one of the defendants above named).

II. That the object of the action is (*state the object*).

III. That the defendant Y. Z. is an infant of the age of _____ years, on the _____ day of _____ last, (*if over fourteen add*), and has neglected to apply for the appointment of a guardian *ad litem* in this action. That he resides with the petitioner,

Order appointing a guardian.

who is his (and that he has no general guardian). Wherefore your petitioner asks that a guardian *ad litem* be appointed to appear and defend said action on behalf of the infant.

(Signature.)

(Add Verification, Consent of Guardian and Affidavit of Competency). See *ante*, 486 to 490.

Order Appointing a Guardian.

(Title of cause.)

(At special term, etc.)

On reading and filing the annexed petition of Y. Z., for the appointment of , as his guardian *ad litem*, with the consent of said , and it being made satisfactorily to appear (to the court) that said is a competent and responsible person.

ORDERED: That he be, and hereby is appointed guardian *ad litem* of Y. Z., infant defendant above-named, and authorized and directed to appear and defend on his behalf the action mentioned therein.

Notice to Defendant or Guardian of an application by the plaintiff for the appointment of a Guardian for an Infant Defendant.

(Title of cause.)

SIR: Please take notice, that unless you procure the appointment of a guardian *ad litem*, to appear and defend this action on your behalf, within twenty days from the service of this summons herein upon you (or, unless the defendant Y. Z. procures the appointment of a guardian *ad litem*, to appear and defend this action on his behalf, within twenty days from the day of , 18 , the date of the service of the summons herein upon him), an application will be made to this court, at a special term thereof, to be held (or to the Hon. , etc.), on the day of , 18 , at o'clock in the forenoon, for an order appointing some suitable and competent person guardian *ad litem* for you (or for said defendant), and authorizing and directing him to appear and defend the above-entitled action in your behalf (or in behalf of said defendant Y. Z.), and for such other and further relief as may be just.

(Date.)

(Signature.)

(Address.)

Proof of Service of Notice of Motion.

(Title of cause.)

(Venue.)

A. B., being duly sworn, says:

I. That he is the managing clerk in the office of the plaintiff in this action; that on day of , 18 , at he served a notice, of which the annexed is a copy, upon G. H.,

Order of appointment on defendant's failure to apply.

the general (or testamentary) guardian within this State, of the infant therein named (or, that the infant therein named was over fourteen years of age on the day of , 18 , and then had no general or testamentary guardian within this State), and that on the day of , at , this deponent served a notice, of which the annexed is a copy, on said infant by delivering the same to him personally (or, that said infant is under fourteen years of age, and residing within this State, with W. Z., his mother, at , and that on the day of , deponent served a notice, a copy of which is hereto annexed, on said W. Z., by delivering the same to her personally).

II. Deponent further says, that twenty days have elapsed since the service of such notice, but said infant has not appeared and no application has been made by him or in his behalf, for the appointment of a guardian *ad litem*, to the best of this deponent's knowledge and belief.

(*Jurat.*)

(*Signature.*)

Order of Appointment on Defendant's Failure to Apply.

(*Title of cause.*)

(*Caption.*)

On reading and filing the annexed notice, proof of service, and of no application on the part of the defendant for the appointment of a guardian *ad litem*, and on motion of , counsel for the plaintiff,

ORDERED: That be and hereby is appointed guardian *ad litem* of the infant defendant Y. Z. in this action, and is authorized and directed to appear and defend the same on his behalf as such guardian.

Petition by the Plaintiff to procure the Appointment of a Guardian for an Infant Defendant.

(*Title of cause.*)

The petition of A. B. (attorney for), the plaintiff in this action, shows:

I. That this action was commenced for (*state the object of the action*).

II. That the summons herein has been served on the defendant Y. Z., as appears by the summons and proof of service hereto annexed.

III. That the defendant is an infant of years of age, on the day of last, and that (although twenty days have elapsed since the service of the summons upon him) he has neglected to apply for the appointment of a guardian *ad litem* in this action.

IV. That the said infant resides with , at , and has not, to the best of the knowledge and information of this deponent, any general or testamentary guardian in this State (*or otherwise as the case may be*).

Notice of motion on foregoing petition — Order appointing guardian — Order nisi.

Wherefore, the plaintiff asks that some suitable and competent person be appointed guardian *ad litem* for said defendant, and be authorized and directed to appear and defend the action in his behalf, and for such other and further relief as may be just.

(Verification.)

(Signature.)

Notice of Motion on Foregoing Petition.

(Title of cause.)

To

Take notice that on a petition, a copy of which is hereunto annexed, and on the summons and complaint in this action, a motion will be made at a special term of this court to be held at , in the city of , on the day of , 18 , at o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order appointing a guardian *ad litem* for the within-named infant in this action, and for such other and further relief as may be just.

(Date.)

(Signature.)

Order Appointing Guardian.

(Title of cause.)

(Caption.)

On reading and filing the petition of A. B., dated , for the appointment of a guardian *ad litem* herein, for the defendant Y. Z., and proof of due service thereof, and on motion of , plaintiff's counsel :

ORDERED : That be and hereby is appointed guardian *ad litem* of the infant defendant Y. Z. in this action, and is authorized and directed to appear and defend the same, on his behalf, as such guardian.

If the application is made *ex parte* on the foregoing petition, the order may be in the following form :

Order Nisi.

(Title of cause.)

(At special term, etc.)

On reading and filing the petition of A. B., dated , for the appointment of a guardian *ad litem*, for the defendant Y. Z., and on motion of , plaintiff's counsel :

ORDERED : That be appointed guardian *ad litem* of the defendant Y. Z., unless, within ten days after service of a copy of this order upon him, he procure a guardian *ad litem* to be appointed.

On proof of the service of the above order, and of the default of the defendant to procure the appointment of a guardian *ad litem*, within the next ten days thereafter, the above order may be made absolute.

Petition for the appointment of a guardian for a non-resident infant defendant.

Order Absolute.

(*Title of cause, etc.*)

On reading and filing the annexed proof of due service of the order of the day of , 18 , and of no application on the part of the defendant for the appointment of a guardian *ad litem*, and on motion of , plaintiff's counsel:

ORDERED: That the said order of the day of be made absolute, and that the said be and hereby is appointed guardian *ad litem* for the defendant Y. Z., and is authorized to appear and defend this suit for him as such.

Petition for the Appointment of a Guardian for a non-resident Infant Defendant in Partition.

(*Title of cause.*) *To the Supreme Court.*

The petition of A. B., the plaintiff in this action, respectfully shows to the court:

I. That this action is now pending in this court.

II. That the action is brought for the partition of real estate situated in the county of , and that the defendant Y. Z. is a necessary or proper party thereto.

III. That the said defendant Y. Z. is an infant under the age of twenty-one years, and resides without the State, at , as the deponent is informed by , and verily believes, and that there is no regular communication, by mail, with such place (or resides without this State, but the place of his residence is not known to the defendant, and his residence cannot, on due inquiry, be ascertained by the petitioner, although he has diligently made such inquiry, *state how*).

IV. That this action was commenced by the service of the summons upon (or, that an order for the service of a summons upon said infant by publication was made by this court on the day of , 18), and that the first publication of the same was made on the day of .

V. That no appearance by or on behalf of said infant, and no application for an appointment of a guardian *ad litem* by him, or on his behalf, has been made, to the best of this deponent's knowledge and belief.

Wherefore the plaintiff asks that some suitable and competent person be appointed guardian *ad litem* for said defendant, and be authorized and directed to appear and defend the action in his behalf, and for such other and further relief as may be just.

(*Verification.*)

(*Signature.*)

Order thereon.

(*Title of cause.*)

(*At a special term, etc.*)

On reading and filing the petition of A. B., the plaintiff in the above-entitled cause, setting forth, among other things, that Y.

Leave to defend—Time to plead.

Z., one of the above-named defendants, is a non-resident infant, and that no guardian has been appointed for him in this action; on motion of G. K., plaintiff's attorney,

ORDERED: That T. S. of _____, be appointed guardian *ad litem* of said infant defendant for the purposes of this action, unless the said defendant, or some one in his behalf within twenty days after service of a copy of this order in the manner herein directed, procure a guardian *ad litem* to be appointed, and give notice thereof to the plaintiff's attorney.

It is further ordered, that this order be served on said infant, either by personal service on _____ with whom said infant resides, or by depositing a copy thereof in the post-office at _____ properly inclosed in an envelope, with postage prepaid, and directed to the said _____ at his place of residence, to wit, the town of _____, and that said guardian execute to the people of this State, and duly acknowledge and file a bond in the penalty of _____ dollars, [to be fixed by the court] and with _____ sureties, to be approved by a justice of this court, conditioned for the faithful discharge of the trust committed to such guardian, and to render a just and true account of his guardianship, in all courts and places when thereunto required.

Section 4. Leave to defend. It may be necessary, before serving an answer in an action, to obtain leave of the court to defend. Thus where a summons has been served by publication, if the defendant wishes to defend the action, he must first apply to the court for permission. Code, § 135. Upon a proper application before judgment, leave to defend will be granted as of course. So, where a wife is sued jointly with her husband, she may answer separately in certain cases, as where the husband's interest is adverse to hers; or where she disapproves of the intended defense; or where she lives separate from him, or where he is out of the jurisdiction of the court or an alien enemy. In either case, leave of the court must be first obtained. *Newcomb v. Keteltus*, 2 Code R. 152. If the defendant is too poor to conduct the defense, it may be proper to apply to the court for leave to defend, as a poor person; under the English Practice leave to defend in *forma pauperis* cannot be obtained in a legal action, although it may be in a suit in equity. This whole question will, however, be fully discussed in one connection under the head with leave to sue, *ante*, 206 to 212.

Section 5. Time to plead. As a rule, either party is allowed twenty days in which to serve a pleading, the time being computed from the date of the service of the pleading calling for such answer or reply. Code, §§ 143, 153. When the preceding

Notice of motion to enlarge time to plead — Affidavit by defendant.

pleading or demand has been served by mail, double time is allowed for the service of the subsequent pleading. Code, § 412. Where the defendant has been arrested under section 183 of the Code, the time to answer the complaint runs from the service of the order of arrest. Code, § 183.

Where an order granting the discovery of books or papers has been complied with or vacated, the party obtaining such order has the like time to prepare his complaint, answer, reply or demurrer, to which he was entitled at the making of the order. Rule 22, Supreme Court.

The time to plead may be extended by the written consent of the parties or their attorneys, or by an order of the court, or of a judge, or by a county judge. Code, § 405; Rule 16, Supreme Court. See also Rule 30, id.

Notice of a Motion to Enlarge the Time to Plead.

(Title of cause.)

SIR: Please take notice, that, on the affidavit a copy of which is hereunto annexed, the undersigned will move the court, at a special term thereof to be held at , on the day of , 18 , at o'clock in the forenoon, to enlarge the time to answer herein days, or for such other or further relief as may be just.

(Date.)

(Signature.)

(Address.)

Affidavit (by defendant).

(Title of cause.)

(Venue.)

Y. Z., being duly sworn, says:

I. That he is the defendant in the above-entitled action.

II. That he has fully and fairly stated the case in this action to R. S., his counsel therein, who resides in , and that he has a good and substantial defense on the merits, to the action, as he is advised by his said counsel and verily believes.

III. (That, *state excuse for requiring further time*,) and that days further time is necessary therefor.

IV. That the complaint herein was served on the day of , 18 , and the time to answer expires on the day of , and no extension of such time has been had (or state what extension of time has been had).

(Jurat.)

(Signature.)

Affidavit by defendant's attorney — Relief from default.

Affidavit (by defendant's Attorney).

(*Title of cause.*)

(*Venue.*)

R. S., being duly sworn, says:

I. That he is the attorney for the defendant in the above-entitled action, and resides in

II. That from the statement of the case in the action made to him by the defendant, deponent verily believes that the defendant has a good and substantial defense upon the merits, to the cause of action set forth in the complaint, or to some part thereof.

III. That the defendant herein (was compelled to leave the city of , where he resides, on business, immediately after the service upon him of the summons and complaint herein, and remained absent two weeks, and that since his return defendant has been unable, by reason of sickness, to instruct deponent concerning his answer in the cause), and that days further time is necessary therefor.

IV. That the complaint herein was served on the day of , 18 , and the time to answer expires on the day of , and that no extension of such time has been had by stipulation or order (*or state what extension has been had if any*).

V. That deponent makes this affidavit instead of the defendant herein (on account of the continued sickness of said defendant, who is thereby prevented from attending before an officer to make this affidavit).

(*Jurat.*)

(*Signature.*)

Order enlarging Time to Answer.

(*Title of cause.*)

On reading and filing the annexed affidavit of , it is

ORDERED: That the said defendant have days additional time to answer the complaint herein.

(*Date.*)

(*Signature of Judge.*)

Section 6. Relief from default. Whenever the defendant by mistake, surprise, inadvertence, or excusable neglect, has suffered a judgment to be entered against him, he should move the court for an order that the judgment be stayed or vacated, and that he be allowed to come in and defend. This motion must be made within a year from the notice of judgment, on the usual notice to the adverse party, or on an order to show cause. Code, § 174. The moving papers should set forth the facts relied on to excuse the default, and be accompanied by an affidavit of merits unless one has once been previously filed and served in the cause. Rules 29 and 30, Supreme Court.

Section 7. Stay of proceedings. In many instances a stay of proceedings is proper and even necessary, both before trial and after judgment. It frequently happens that a party would be debarred from some substantial right, or prevented from seeking redress for a wrong, through the lack of time to make a proper application to the court, if the proceedings of such party could not be stayed until the right to such relief could be determined. The order granting a stay may be made by the court or by a judge at chambers. Code, § 401.

An order to stay proceedings for a longer time than twenty days will not be granted by a judge out of court, unless it be to stay proceedings under an order or judgment appealed from, or upon previous notice to the adverse party. *Ib.*

This order will be granted whenever it shall appear from the affidavits of the moving party that such order is necessary to the protection of his rights; and that no negligence on his part has contributed toward creating the necessity for the granting of the order.

Section 8. Election or consolidation of actions. Whenever several suits shall be pending in the same court, by the same plaintiff against the same defendant, for causes of action which may be joined, the court in which the same shall be prosecuted may, in its discretion if it shall appear expedient, order the several suits to be consolidated into one action.

If one or more of such suits be pending in the supreme court, and others be pending in any other court, the supreme court may order the suits in the other courts to be consolidated with that in the supreme court. 2 R. S. 383 (398). The same statute also empowers the plaintiff, at any stage of the action, to consolidate in one, several suits commenced in the same court against joint and several debtors. *Ib.*

Whenever several distinct suits are brought on causes of action that may be joined, the defendant may move for the consolidation of the various actions in one; and where no defense is intended in either action, this consideration becomes important as a means of avoiding the additional costs of entering up several judgments. This relief will be granted as a favor, whenever the moving papers show that no defense to either action is intended; and as a right when it shall appear that the questions which will arise are substantially the same in both.

Wilkinson v. Johnson, 4 Hill, 46; *Dunning v. Bank of Auburn*,

Election or consolidation of actions — Interpleader.

19 Wend. 23; *Dunn v. Mason*, 7 Hill, 154. Whenever the defendant proposes to defend either action, a motion to consolidate is of doubtful propriety. *Wilkinson v. Johnson*, 4 Hill, 46; *Pierce v. Lyon*, 3 id. 450. The application for consolidation may be made by the plaintiff as well as the defendant. *Briggs v. Gaunt*, 4 Duer, 664; 2 Abb. 77. If made by a plaintiff it will be premature if before the defendants have answered in both actions. *Le Roy v. Bedell*, 1 Code R. N. S. 201.

If the complaint contains several causes of action improperly united, the defendant should not move that the plaintiff elect under which cause of action he will proceed, but should demur. *Redmond v. Dana*, 3 Bosw. 615.

Section 9. Interpleader. It sometimes occurs that a party is made sole defendant in an action in which he has no interest beyond that of a mere stakeholder, and in which another party, who is a stranger to the action, makes a demand against him for the same debt or property which is the subject of the controversy. In cases of this nature, where the defendant admits the indebtedness to *one* of the parties, and refrains from complying with the demands made against him only through uncertainty as to *what* party is entitled to recover, the defendant should apply for an order of interpleader, under section 122 of the Code. *Patterson v. Perry*, 14 How. 505; S. C., 6 Duer, 686; *Sherwood v. Partridge*, 11 How. 154; S. C., 4 Duer, 646; 1 Abb. 256; *Johnson v. Lewis*, 4 Abb. N. S. 150; *Beck v. Stephani*, 9 How. 193; *Van Buskirk v. Roy*, 8 id. 425. But, where the *amount* of indebtedness is likewise a matter of dispute, the remedy given by this section is not applicable. *Ib. Chamberlain v. O'Connor*, 8 How. 45; S. C., 1 E. D. Smith, 665. The effect of this order will be to substitute, in the place of the defendant, the person not a party to the action who makes a demand against him, and to discharge the defendant from all liability to either party on his depositing in court the amount of the debt, or delivering the property or its value to such person as the court may direct. Code, § 122.

The remedy given by the Code is not new, nor has it extended the cases to which the old bill of interpleader would apply. The action under the Code must take the same course, and be governed by the same rules, as were formerly applied in chancery. *Washington Life Insurance Company v. Lawrence*, 28

Bill of particulars or copy of account.

How. 435; *Vosburgh v. Huntington*, 15 Abb. 254. See title "Interpleader," *ante*, 165 to 180.

Section 10. Bill of particulars or copy of account. If either party to an action plead an account, it is not necessary to give in detail the items of which it is composed. But, on a written demand, such party must furnish within ten days a bill of the items, and if the pleading to which it relates is verified, the copy account must be verified also. If the first bill of particulars is defective, the court, or a judge thereof, or a county judge, may order a further account, and the court may in all cases order a bill of particulars of the claim of either party to be furnished. Code, § 158. A bill of particulars need not include the offsets or payments which he has credited to the adverse party in the complaint. *Williams v. Shaw*, 4 Abb. 209. This subject will be fully discussed in connection with the title "Pleadings."

Affidavit to Obtain an order for a Bill of Particulars.

(*Title of cause.*)

(*Venue.*)

Y. Z., the defendant in this action, being duly sworn, says:

I. That the complaint was served upon him on the _____ day of _____, 18____, at _____.

II. That this action is brought for (*state general object of the action*).

III. That the said cause of action is alleged generally in the complaint, and without stating the particulars of the (claim).

IV. That the deponent intends in good faith to defend this action, and that he is ignorant of the particulars of the claim made against him in said complaint.

V. That the deponent cannot answer the said complaint with safety until he is furnished with the said particulars of the plaintiff's demand, as deponent is informed by R. S., his counsel, and verily believes.

VI. That the time to answer herein will expire on the day of _____, and that no extension thereof has been had herein, by stipulation or consent, and that deponent has fully and fairly stated the case in this action to the said R. S., his counsel, who resides at _____, and that he has a good and substantial defense on the merits to the action as he is advised by his said counsel and verily believes.

(*Jurat.*)

(*Signature.*)

Alternative Order to Furnish a Bill of Particulars.

(*Title of cause.*)

Upon the summons and complaint in this action and the annexed affidavit, let the plaintiffs deliver to the defendant's

Proof of service of the above order and default.

attorney an account, in writing, of the particulars of the demand for which this action is brought (*or* the demand mentioned in folios and of the complaint) on or before the day of , at o'clock; or show cause at that time before me at , why he should not deliver such account, and, in the mean time, let all further proceedings on the part of the plaintiff be stayed, and let the defendant have days further time to answer).

(*Date.*)

(*Signature of Judge.*)

Proof of Service of the above Order and default.

(*Title of cause.*)

(*Venue.*)

A. B., being duly sworn, says, that he is (managing clerk in the office of) the defendant's attorney herein; that on the day of , at , he served a copy of the annexed affidavit and alternative order for a bill of particulars upon the plaintiff's attorney herein, by delivering the same personally to him, (*or other mode*) and that no bill of particulars in this action has been served on the defendant's attorney herein.

(*Jurat.*)

(*Signature.*)

Peremptory Order to Serve Bill of Particulars.

(*Title of cause*)

On the foregoing order to furnish a bill of particulars, or to show cause, and on proof of service thereof (and default therein), and on motion of R. S., counsel for Y. Z., and hearing O. P. for A. B. (*or* no one appearing), in opposition thereto;

ORDERED: That the plaintiff's attorney deliver to the defendant's attorney an account in writing of the particulars of the demand for which this action is brought (*or* of the demand mentioned in folios and , within days); and, in the mean time, let all further proceedings in this action, on the part of the plaintiff, be stayed.

(And it is further ordered, that the defendant have days further time from that date, or from the service of such bill, if sooner served, within which to answer the complaint.)

(*Date.*)

(*Signature of Judge.*)

Affidavit to obtain an Order for a Further Bill of Particulars.

(*Title of cause.*)

(*Venue.*)

Y. Z., the defendant herein, being duly sworn, says, that A. B., the plaintiff herein, in pursuance of an order requiring him to do so, served upon the defendant's attorney a bill of particulars, of which the annexed is a copy, and that said bill is defective and insufficient to enable the defendant to answer, in

Order for a further bill of particulars.

that it does not state (*point out defects*), and that a further and better bill of particulars in this respect is essential and material to the defense of the defendant in this action.

(*Jurat.*)

(*Signature.*)

Order for a further Bill of Particulars.

(*Title of cause.*)

On the annexed affidavit let the plaintiff's attorney deliver to the defendant's attorney a further account, in writing, of the particulars of the demand for which this action is brought, within days, specifying (*state in what particular a fuller account is required*), and, in the mean time, let all further proceedings in this action, on the part of the plaintiff, be stayed. (And it is further ordered, that the defendant have days further time from that date, or from the service of such bill, if sooner served, within which to answer the complaint.

(*Date.*)

(*Signature of Judge.*)

Section 11. Discovery of books and papers to draw answer. If the defendant desires an inspection of books and papers under the control of the plaintiff, to enable him to draw his answer, or to furnish a bill of particulars of a set-off or counterclaim, he may apply for an order for a discovery under the provisions of the Code, or of the Revised Statutes. The manner of making the application has been briefly noticed in a preceding chapter, and a full discussion of the subject will be given elsewhere. See Rules 18 to 22 of the Supreme Court; Code, §§ 388, 391; 2 R. S. 199 (207), §§ 21, 28. See title "Discovery," etc.

Section 12. Security for costs. In many instances it will be a wise precaution on the part of the defendant to require the plaintiff to give security for costs, before proceeding with his action. In proper cases, an order may be obtained requiring this security to be filed within a time specified, and staying all proceedings until the order is complied with.

The cases in which this order may properly issue are defined in the Code, and in the Revised Statutes. Code, § 317; 2 R. S. 620 (644).

As to the practice on applying for security for costs, see title "Security for Costs." See also *Cadwell v. Manning*, 15 Abb. 271; S. C., 24 How. 38; *Colt v. Wheeler*, 12 Abb. 388; *Bronson v. Freeman*, 8 How. 492.

Section 13. Changing place of trial. Where the action is of a transitory character, if the defendant has a greater number of

Paying money into court.

witnesses residing in a county other than that which the plaintiff has named as the place of trial, he should move the court to change the place of trial to that county. The same course may be pursued if there is reason to believe that a fair and impartial trial cannot be had in the county where the place of trial is fixed by the complaint. Certain actions *should* be tried in the county where the subject, or some part thereof, is situated, but the defendant may waive his right to transfer the action to the proper county when commenced elsewhere, by delay in applying to the court for a change of the place of trial. Rule 59, Supreme Court; Code, § 126; *ante*, 181.

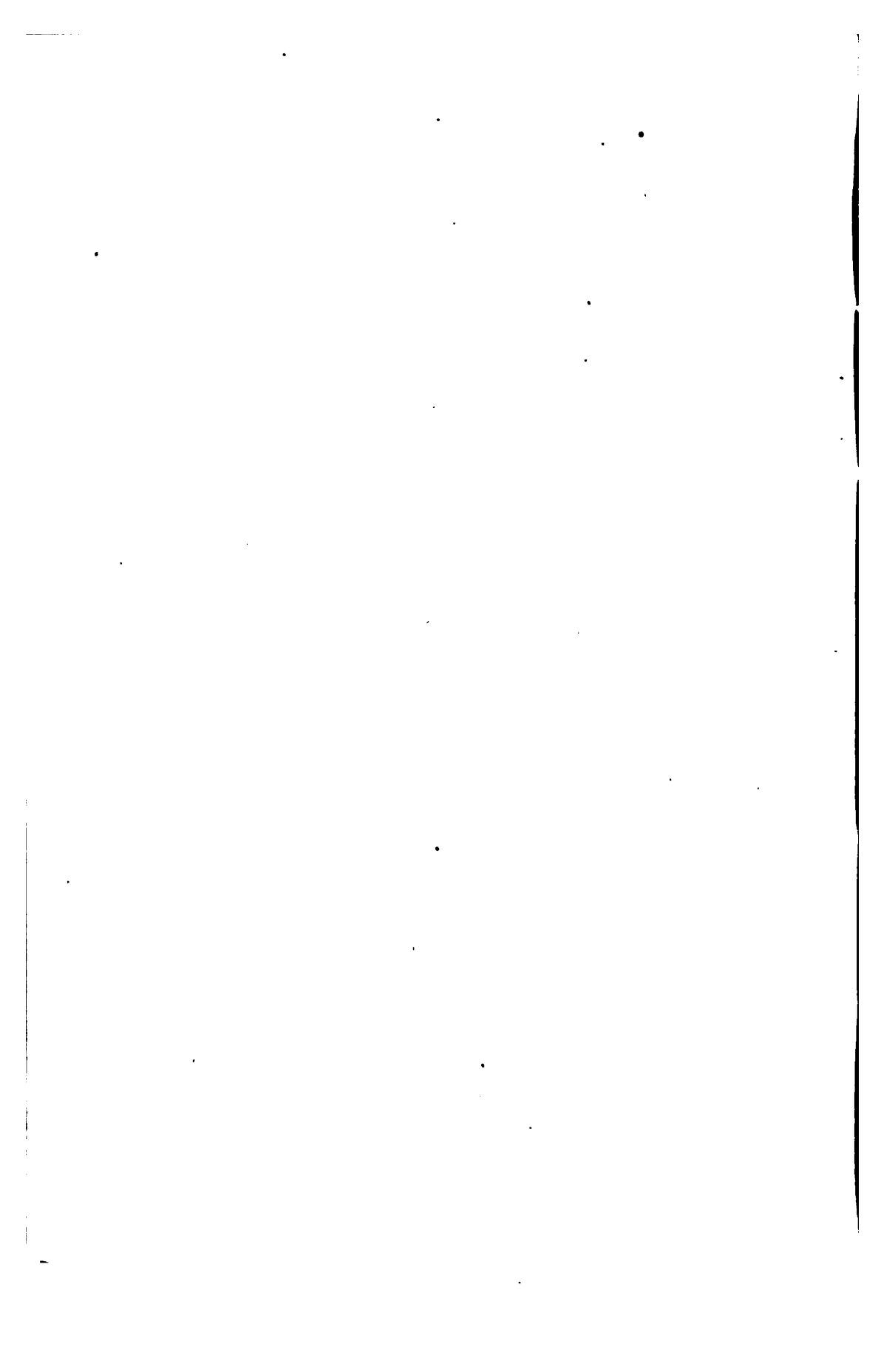
Whenever the convenience of witnesses and the ends of justice would be promoted by the change, the defendant should make a written demand of the plaintiff that the change be made, and if this request be refused, he should move the court for an order staying proceedings until a motion to make such change can be argued. See Code, title 4; Rules 59, 60, Supreme Court. This subject is fully discussed in a subsequent chapter of this work.

Section 14. Tender. At any time before trial, or even before judgment, in some actions the defendant may tender to the plaintiff, or his attorney, the sum he conceives to be actually due, together with the costs of the action up to that time. This procedure applies to actions at law for the recovery of such demands as properly fall under subdivision 1 of section 129 of the Code, or for a casual or involuntary trespass or injury. The effect of the tender is to bar the recovery of any interest or costs that may accrue at a time subsequent to the tender, if the plaintiff fail to recover in the action more than the amount tendered. 3 R. S. (5th ed.) 868, §§ 22 to 25; 2 R. S. 554 (574).

Section 15. Paying money into court. In case the defendant is willing to pay a part of the plaintiff's demand, but not the full claim, he may still obtain an order permitting him to pay into court the amount admitted to be due, and the costs, up to that time. Should the plaintiff accept the sum the suit is at an end. But, should he proceed in the action and recover no more than the sum paid in, he can recover no additional costs. If, on the other hand, he recover judgment for more than the amount paid into court, the payment is inoperative, except to decrease the judgment, by a credit of the amount paid. *Dakin v. Dunning*, 7 Hill, 30.

Offer of judgment.

Section 16. Offer of judgment. The defendant in *any* action may, with like effect, deliver to the plaintiff a written offer of judgment for a sum specified therein, with the costs of the action to the date of the offer Code, §§ 385 to 387. And whenever there is a sum actually due the plaintiff, from the defendant, it is a wise precaution, as well as a measure of strict justice, to make an offer of judgment for the full sum due. The offer, if not accepted, cannot in any case prejudice the defendant's cause, and may save him costs. See Offer of Judgment.



PART V.

PROVISIONAL REMEDIES.

CHAPTER I.

ARREST AND BAIL.

ARTICLE I.

ARREST IN GENERAL, NATURE AND OBJECT OF ARREST.

Section 1. Definition and nature. The term *arrest*, as used in civil practice, may be defined as the restraint of a person's liberty by virtue of the execution of a legal process. This restraint is not necessarily the result of actual force or seizure of the person; but to constitute an arrest, there must be a total submission of personal freedom to the control of a court, as represented in the person of its officer and the process under which he acts.

Section 2. Object of arrest. The theory and aim of the law in allowing an arrest in certain civil actions, is to give to the plaintiff the highest possible security against fraud, not only by compelling the appearance of the defendant to answer to the demands made against him, but, also, by retaining his person in custody, to make the satisfaction of any judgment that may be rendered in such actions a condition precedent to the enjoyment of personal liberty.

An arrest is founded on the probable wrong-doing of the defendant; and the possible removal of his person and property beyond the jurisdiction of the court if served with the ordinary summons only. To prevent this defect of justice the law gives, in specified cases, the right of arrest. In the exercise of this right, a plaintiff may deprive a defendant of the opportunity of secreting or removing his property before judgment, and may hold his person as a pledge for the satisfaction of such judgment when it shall have been rendered against him.

Practice as to arrest before the non-imprisonment act.

The law intends also, that the disgrace resulting from imprisonment; the compulsory abandonment of all remunerative employment; and the loss of personal freedom, shall supply the want of good intentions on the part of the defendant, in urging the speedy settlement of just claims resulting from his wrong. See *People ex rel. Latorre v. O'Brien*, 6 Abb. N. S. 63 (69); *National Bank of the Commonwealth v. Temple*, 2 Sweeny, 344.

ARTICLE II.

PRACTICE AS TO ARREST BEFORE THE NON-IMPRISONMENT ACT.

Section 1. When of course. Prior to the passage of the non-imprisonment act in 1831, the statute was as follows: "In the following cases the defendant may be held to bail, of course, and without any special order for that purpose:

1. In all actions of debt except such as shall be brought upon a judgment rendered in a suit wherein the defendant was held to bail, and except such as shall be brought upon any bail-bond or recognizance of bail, or upon any replevin or other bond in which any surety shall have joined, taken in the course of judicial proceedings, or by virtue of any statute.

2. In all actions upon contracts for the payment of any money, the performance of any service, or delivery of any property, where the demand or damages shall be certain, or can be reduced to certainty.

3. In all actions of trover, and in actions of trespass for taking personal property, and in actions of replevin in the cases provided by law.

4. In actions for trespass upon lands." 2 R. S. 348 (359), § 7.

Section 2. When upon a special order. As to arrests in other actions, the statute provided, that in all cases other than such as are herein provided for holding a defendant to bail, an order requiring such bail may be granted by a judge of the court in which the writ is issued, in the cases and according to the practice established in the supreme court. *Id.*, § 8.

In what cases no arrest can be made.

ARTICLE III.

IN WHAT CASES NO ARREST CAN BE MADE.

Section 1. There must be a right of action. In all cases the right to arrest pre-supposes an existing right of action. A plaintiff cannot maintain the arrest of a defendant where he cannot show himself entitled to maintain an action; and any defense, properly pleaded, that must defeat the action, will be fatal to the maintenance of an arrest in such action. See *Neville v. Neville*, 22 How. 500. Thus, in an action for money received in a fiduciary capacity, but in the course of an illegal employment, no arrest can be maintained, as the action itself is not maintainable. *Rolfe v. Delmar*, 7 Rob. 80; *De Groot v. Van Duzer*, 20 Wend. 390.

So an arrest made before the right of action has accrued will be vacated, and will be a bar to a subsequent arrest for the same cause of action. *Wheelwright v. Joseph*, 5 Maule & Selw. 93.

So, if the right of action is barred by the statute of limitations, the right to maintain an arrest is also barred. But, in order to avail himself of this objection, the defendant must plead the statute as a defense. *Arthurton v. Dalley*, 20 How. 311.

As a general rule, all the rights of an assignor to any remedy to which he is entitled from the nature of the action, pass to the assignee with the assignment of the right of action. *King v. Kirby*, 28 Barb. 49; *Grocers' National Bank v. Clark*, 32 How. 160; S. C., 48 Barb. 26. Thus the right of arrest passes to the assignee of an assignable cause of action. *Ib.* But, if the right of action is not assignable, it is evident that the assignee of such right can neither maintain an action thereon nor acquire a right to the remedies incident thereto. The statute indirectly determines what causes of action are assignable, by specifying in what cases a right of action survives to the personal representatives of the party entitled to maintain such action, as the power to assign and to transmit to personal representatives are convertible propositions. See *Zabriskie v. Smith*, 13 N. Y. (3 Kern.) 322; *Fried v. New York Central Railroad Company*, 25 How. 285. See 2 R. S. 447 (467). This subject has, however, been fully treated in connection with "Parties to Actions." See *ante*, 142,

Exemption from arrest under the non-imprisonment act.

91, 93. The illustrations given may serve to show that the existence of a right of action in the plaintiff is in all cases a condition precedent to the right to maintain an arrest.

Section 2. Exemption from arrest under the non-imprisonment act.

a. General. The provisions of the Code, in relation to arrest and bail, have not in any sense superseded the "Act to abolish imprisonment for debt and to punish fraudulent debtors," passed April 26, 1831. *People ex rel. Latorre v. O'Brien*, 6 Abb. N. S. 63; *People ex rel. Sharkey v. Goodwin*, 50 Barb. 562; *Hall v. Kellogg*, 12 N. Y. (2 Kern.) 325; *Cobb v. Harmon*, 23 N. Y. (9 Smith) 148. The Code itself, while it declares that "No person shall be arrested in a civil action except as prescribed by this act," adds explicitly, "but this provision shall not affect the act to abolish imprisonment for debt, and to punish fraudulent debtors, passed April 26, 1831; or any act amending the same." The meaning of this declaration is, that the non-imprisonment act shall stand in full force and effect notwithstanding any thing contained in the Code; and that, if there is any apparent incongruity in the several provisions of the two enactments, the former statute in the cases to which it relates, and not the latter, shall prevail. *People ex rel. Latorre v. O'Brien*, 6 Abb. N. S. 63. It follows as a necessary consequence that a warrant may issue in all cases prescribed by this act, and that the only limit to the general application of the act must be sought in the provisions of the act itself. See *Latham v. Westervelt*, 26 Barb. 256; *Gregory v. Weiner*, 1 Code R. N. S. 210. These statutory limitations will be treated in their order.

b. Actions on judgment founded on contract. The first section of the non-imprisonment act provides that no person shall be arrested or imprisoned on any civil process issuing out of any court of law, or on any execution issuing out of any court of equity, in any suit or proceeding instituted for the recovery of any money due upon any judgment or decree founded upon contract, or due upon any contract, express or implied, or for the recovery of any damages for the non-performance of any contract. Laws of 1831, ch. 300, § 1.

c. Costs. No person shall be imprisoned for the non-payment of interlocutory costs, or for contempt of court in not paying costs, except attorneys, solicitors, counselors and officers of

Exemption from arrest under the Code.

court when ordered to pay costs for misconduct as such, and witnesses when ordered to pay costs on attachment for non-attendance. Process in the nature of a *feri facias* against personal property may be issued for the collection of such costs founded on such order of court. Laws of 1847, ch. 390, §§ 2, 3.

d. Exceptions to exemption. The general provisions of the non-imprisonment act, exempting a defendant from arrest in an action on contract (see sub. c., *ante*, 590), are modified by the second section of that act, which provides that the preceding section (§ 1) shall not extend to proceedings as for contempts to enforce civil remedies; nor to actions for fines or penalties, or on promises to marry, or for moneys collected by any public officer, or for any misconduct or neglect in office or in any professional employment. Laws of 1831, ch. 300, § 2.

It is also provided, that in all actions upon contract for moneys received by any attorney, or by any other male person in a fiduciary capacity, the defendant or defendants shall be liable to imprisonment in the same manner as in actions for wrongs. Laws of 1846, ch. 150.

Section 3. Exemption from arrest under the Code.

a. General. Exemption from arrest may be considered as either permanent or temporary; and may arise from considerations of public policy, or from extinction of the remedy by the act of the parties, or from the extinction of the remedy by operation of the law. The strict impartiality of the law is, in certain cases, modified by considerations of the superior claims of the public over private interests, and an absolute exemption from arrest extended to those who have the public interests in charge, so far as the right of arrest is founded on individual demands. This exemption may be guaranteed by the law of nations, or by special statutes. The right of arrest may also be waived by the act of the party entitled to the right, and absolute exemption extended to the party liable thereto so far as that liability depends on a particular cause of action. The right to this exemption may be declared by the common law, or may depend on the judicial construction of the statutes. So the original cause of action, with the remedies incident thereto, may be merged in a judgment, and a right to exemption from arrest in that case be given by operation of law. The existence of the right in this case is a strictly legal question and must be determined by the current of judicial decisions. The right to exemption from

Exemptions under United States laws.

arrest in the majority of cases is, however, founded upon the common right of all persons to the enjoyment of personal liberty, until that right has been restricted by statute. And it is a universal rule that whenever a statute gives the right of arrest in specified cases, it also expressly restricts that right to such cases only. The right to exemption thus becomes the rule, and the liability to arrest the exception. This will be readily seen by an examination of the provisions of the Code, in regard to arrest and bail.

b. Arrest in no cases but those allowed by the Code or non-imprisonment act. The Code expressly provides that no person shall be arrested in a civil action except as prescribed by that act, but adds as a qualifying clause, that this provision shall not affect the act to abolish imprisonment for debt and to punish fraudulent debtors, passed April 26, 1831, or any act amending the same, nor shall it apply to proceedings for contempts. Code, § 178. It follows, as a necessary deduction from the language of this section, that no person can be arrested in any civil action in this State, except where the right of arrest is expressly given to the plaintiff by section 179 of the Code, or by the non-imprisonment act, or where the statutes regulating proceedings for contempts have conferred this right upon the courts to enforce obedience to their orders and decrees. How far this general exemption is modified by the statute governing the allowance of a writ of *ne exeat* will be hereafter discussed. See *Ne Exeat, post*.

It now remains to be considered in what cases a defendant, subject to arrest under some provision of statute, can claim exemption on grounds wholly unconnected with the nature of the cause of action.

Section 4. Exemptions under United States laws.

a. In general. From considerations of public policy, and of regard for the general welfare of the nation and of the several States of which it is composed, the federal government has declared a certain class of persons exempt from arrest in all civil actions. As the persons composing this class are rendered exempt solely on account of their public or official character, or on account of their relations with persons in such character, the duration of the exemption is made to depend, in most cases, upon the actual or constructive continuance of such character or relations. This, however, is not universally true.

Ambassadors, foreign ministers and their domestic servants.

b. Ambassadors, foreign ministers and their domestic servants. By the act of congress of April 30, 1790 (§§ 25, 26), all writs or process whereby any ambassador or public minister of any foreign prince or State, authorized and received as such by the president of the United States, or any domestic, or domestic servant of any such ambassador or other public minister, may be arrested or imprisoned, or his goods or chattels may be seized, are void. And any person suing out such process, or prosecuting or executing it, is liable to a fine, in the discretion of the court, and imprisonment not exceeding three years.

This act is substantially a reenactment of an English statute, which was held to be merely declaratory of the law of nations, except so far as it provided for the punishment of any person infringing on such law. See statute 7 Anne, ch. 12, § 3; *Briquet v. Bath*, 3 Burr. 1478; *Viveash v. Becker*, 3 Maule & Selw. 284. The courts of this State have made similar decisions in respect to the act of congress above quoted, and have declared that the right of ambassadors and foreign ministers to exemption from arrest was not dependent upon nor limited by that act, but that the object of the act was to enforce the privileges accorded to such persons by the law of nations, and to punish any violation of them. *Holbrook v. Henderson*, 4 Sandf. 619; *Valarino v. Thompson*, 7 N. Y. (3 Seld.) 576 (578). Thus an ambassador from one sovereign State to another is privileged from arrest on civil process while traveling through the territories of a State to which he is not accredited, in the execution of the duties of his mission. *Holbrook v. Henderson*, 4 Sandf. 619.

So a secretary of legation, duly accredited by a foreign government, and acting, in the absence of his ambassador, as *chargé d'affaires*, is entitled to all the privileges of an ambassador. *Taylor v. Best*, 14 C. B. 487; S. C., 25 Law and Eq. 383; *Ex parte Cabrera*, 1 Wash. C. C. 232; *United States v. Benner*, Bald. 234.

The evidence requisite to establish the official character of an ambassador or foreign minister is a recognition as such by the chief executive officer of the nation. *United States v. Ortega*, 4 Wash. C. C. 531; *United States v. Benner*, Bald. 234; *Taylor v. Best*, 14 C. B. 487; S. C., 25 Law and Eq. 383.

The exemption from arrest extended to a foreign minister, or such other persons as are embraced within the meaning of this term, is not terminated by the fact that the official character of

Consuls and vice-consuls.

such persons have ceased. The statute is, in all respects, entitled to a liberal construction. *D'Azambujga v. Pariera*, 1 Miles, 366; *Dupont v. Pichon*, 4 Dall. 321.

But the privilege from arrest conferred on the servant of the ambassador is for the benefit of the ambassador, and not the servant, and if the ambassador makes no application for the discharge from arrest, the courts will not interfere, unless the servant show a clear case of service or hiring. *Fisher v. Begrez*, 2 Dowl. P. C. 279. The exemption cannot be claimed by any person who is only colorably, and not *bona fide* in the service of such ambassadors. *Lockwood v. Dr. Coysgarne*, 3 Burr. 1676; *Heathfield v. Chilton*, 4 id. 2015. But the fact that the servant does not reside with the ambassador, or that he is or is not a native of this country, has no bearing on the question of exemption. *Ib.*

c. *Consuls and vice-consuls.* By the act of 1789, chapter 20, section 9, consuls and vice-consuls were made exempt from any process issuing out of a State court, although they may be sued in the federal courts. *United States v. Reward*, 2 Dall. 299; *Commonwealth v. Kosloff*, 5 S. & R. 545; *Valarino v. Thompson*, 7 N. Y. (3 Seld.) 576; *Griffin v. Dominguez*, 2 Duer, 656; S. C., 11 N. Y. Leg. Obs. 285. And a consul cannot renounce the exemption from being sued in a State court, because it is not his personal privilege, but the right and privilege of the United States that he should be sued in the federal courts; and, for a like reason, he cannot avoid the exclusive jurisdiction of those courts by joining in a contract with another person and thus subjecting himself to a joint suit. *Valarino v. Thompson*, 7 N. Y. (3 Seld.) 576. All further proceedings in an action will be arrested *whenever* it shall appear that the court has no jurisdiction. *Valarino v. Thompson*, 7 N. Y. (3 Seld.) 576; *Davis v. Packard*, 7 Pet. 276; *Manhardt v. Soderstrom*, 1 Binney, 138. It follows from these decisions, that a necessary co-defendant in an action against a consul is exempt from arrest on any civil process issuing from a State court, and cannot, by consent, confer jurisdiction on or waive his right to object to such jurisdiction at any stage of the action. See *Naylor and Rock River Bank v. Hoffman*, 22 How. 510; S. C., 14 Abb. 72.

d. *Members of congress.* By the constitution of the United States, senators and representatives in congress are privileged from arrest, in all cases except treason, felony, and breach of the

 Exemption under other statutes and decisions.

peace, during their attendance at the session of their respective houses, and in going to and returning from the same. Const. U. S., art. 1, § 6.

This privilege is to be taken strictly, and is allowed only while the party is attending congress, or is actually on his journey going to or returning from the seat of government. *Lewis v. Elmendorf*, 2 Johns. Cas. 222.

e. Soldiers and sailors in the United States service. All non-commissioned officers, musicians, seamen and mariners, artificers and soldiers in the United States service, are exempt from arrest for any debt or contract. 1 Story's Laws U. S. 543, 709; 2 id. 835; Acts of Congress, March 16, 1802, § 23; July 11, 1798, § 5.

A regiment of the State militia, when mustered into the service of the United States, does not cease to be a part of the militia of the State, although employed by the general government and subject to the regulations and discipline of the regular army. And a commissioned officer of such regiment, mustered into the service of the United States, is entitled to exemption from arrest on civil process under the laws of this State. See ch. 129, Laws of 1858. And the provisions of the act of congress, limiting the privilege of exemption from arrest, of persons in the military force of the United States, to non-commissioned officers and privates, do not affect the rights of a commissioned officer of the State militia to such exemption, although mustered into the service of the United States. *People ex rel. Gaston v. Campbell*, 40 N. Y. (1 Hand) 133.

Section 5. Exemption under other statutes and decisions.

a. General. Under the United States constitution, the legislature of the respective States have a right to regulate or abolish imprisonment for debt, as a part of the means for inducing, or as a remedy for enforcing, the performance of contracts. The general principle that a State cannot pass a law impairing the obligation of contracts does not apply here. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation. *Mason v. Haile*, 12 Wheat. 370; *Beers v. Haughton*, 9 Pet. 329. And where, by the laws of any State, imprisonment for debt is allowed under certain conditions and restrictions, the same conditions and restrictions are applicable to the process issuing out of the courts of the United States. Act of Feb. 28, 1839, § 1; 5 Stat. at Large, 321.

Members and officers of the State legislature.

b. Members and officers of the State legislature. By the laws of this State every member of the legislature is privileged from arrest on any civil process (except in an action against him for a forfeiture, misdemeanor or breach of trust in any office or place of trust held by him) during his attendance at the session of the house to which he belongs, or while going to or returning from such session, provided such going or returning does not exceed fourteen days; or for fourteen days previous to any session; or during an adjournment not exceeding the same space of time; or while absent on leave of the house to which he belongs. 1 R. S. 154 (152). No officer of either house, while in actual attendance on the house, is liable to arrest on any civil process. *Id.*, § 10. As to who are the officers privileged from arrest by this section, see 1 R. S. 95 (86). The protection from arrest secured to members of the legislature while returning home does not continue after such return, although the fourteen days have not expired. The return itself terminates the privilege, and not the lapse of the time allowed for such return. *Corey v. Russell*, 4 Wend. 204.

c. State militia. No person belonging to the military forces of the State can be arrested on any civil process while going to, remaining at, or returning from any place at which he may be required to attend for the election of officers or other military duty. Laws of 1870, ch. 80, § 257; Laws of 1858, ch. 129, § 17. See *People v. Campbell*, 40 N. Y. (1 Hand) 133. Any member of a militia company is also exempt from arrest on any parade day from the rising to the setting of the sun. 1 R. S. 303 (276), § 27.

d. Policemen. No person holding office under the "Act to establish a Metropolitan Police District" is liable to arrest on a civil process while actually on duty. Laws of 1857, ch. 569, § 18; 2 R. S. (5th ed.) 1011; Laws of 1860, ch. 259, § 34; 4 Edm. Stat. 267. But no rule established by the police commissioners that certain officers "shall be deemed to be always on duty" can in any manner affect the right of third parties to arrest such officers when not actually on duty. *Hart v. Kennedy*, 39 Barb. 186; S. C., 15 Abb. 290; 24 How. 425; *Squires' Case*, 12 Abb. 38. The same exemption from arrest is conferred by statute on the officers composing the capital police. Laws of 1865, ch. 554, § 27.

e. Canal commissioners, etc. No acting commissioner, superintendent of repairs, collector or lock-keeper on any canal

Officers of courts of record — Parties to suits, jurors and witnesses.

shall be held to bail, or taken by warrant in any civil suit for any act done, or omitted to be done by him in the exercise of his official duties. 1 R. S. 224, § 43.

f. Officers of courts of record. All the officers of the several courts of record of this State are exempt from arrest in any civil action in which they are sole defendants, during the sitting of the court of which they are officers. But this exemption is limited to the time of the actual sitting of the court and to actions in which such officers are sole defendants. An officer of a court, when sued with any other person, is liable to arrest even during the sitting of the court of which he is an officer. 2 R. S. 290 (300), § 86.

Attorneys and counselors are privileged from arrest while actually attending or going to or returning from court. *Humphrey v. Cumming*, 5 Wend. 90; *Sperry v. Willard*, 1 id. 32; *Secor v. Bell*, 18 Johns. 52. But they are not exempt from arrest while remaining at home, although such arrest would prevent their attendance upon court. *Corey v. Russell*, 4 Wend. 204. Neither is an attorney or counsel privileged from arrest while attending before a judge out of court. *Cole v. M'Clellan*, 4 Hill, 59. And in all cases to exempt an attorney, counselor, or solicitor from arrest during the sitting of the court, he must be employed in some cause pending and then to be heard in that court. 2 R. S. 290 (301), § 86. But attendance for the purpose of making a special motion will be sufficient to confer the privilege from arrest. *Humphrey v. Cumming*, 5 Wend. 90. This privilege does not attach to the office, but is founded upon the necessity of the attendance of the attorney to protect the interests of his client. *Brooks v. Patterson*, 2 Johns. Cas. 102. But even when in actual attendance during the sitting of the court for the purpose of protecting the rights of his client in a cause pending and then to be heard in such court, the attorney is still liable to arrest in an action in which he is not the sole defendant. 2 R. S. 290 (300), § 86. And in all cases, the attorney may waive his privilege from arrest; and such waiver may be presumed from his conduct. *Cole v. M'Clellan*, 4 Hill, 59; *Petrie v. Fitzgerald*, 1 Daly, 401 (405).

g. Parties to suits, jurors and witnesses. The statutes provide that every person duly and in good faith subpoenaed as a witness to attend any court, officer, commissioner or referee, or summoned to attend any judge, officer or commissioner in any

Parties to suits, jurors and witnesses.

case where the attendance of such witness may by law be enforced by attachment or by commitment, shall be exonerated from arrest in any civil suit while going to the place where he shall be required by such subpoena to attend, while remaining at such place and while returning therefrom. 2 R. S. 402 (418), § 51 (41). Every arrest of a witness made contrary to the foregoing provisions shall be absolutely void, and shall be deemed a contempt of the court issuing the subpoena; and every person making such arrest shall be responsible to the witness arrested for three times the amount of the damages which shall be found by the jury, and shall also be liable to an action at the suit of the party who subpoenaed such witness, for the loss, hindrance and damage sustained by him in consequence of such arrest. 2 R. S. 402 (419), § 54. The statute also provides for the discharge of a witness so arrested. *Id.*, §§ 52, 53. The statute also prescribes the manner in which the sheriff may avoid all liability to either party, either in making or in not making the arrest. *Id.*, § 55.

This exemption from arrest does not extend to a witness who attends voluntarily and without a subpoena, unless the witness is a non-resident of the State. *Hardenbrook's Case*, 8 Abb. 416; *Ex parte McNeil*, 6 Mass. 264; *Cole v. M' Clellan*, 4 Hill, 59 and note.

But, if the witness is a non-resident, he is exempt from arrest while attending court, whether served with a subpoena or not. *Dixon v. Ely*, 4 Edw. Ch. 557; *Sanford v. Chase*, 3 Cow. 381. The same general rules apply to parties. There is no distinction between the rule of exemption from arrest while attending court, as a party or as a witness. Either will be entitled to a discharge from arrest, if a citizen or resident of this State, on entering his appearance; and, if from a foreign State, absolutely. *Pollard v. Union Pacific Railroad Co.*, 7 Abb. N. S. 70; *Merrill v. George*, 23 How. 331; *Seaver v. Robinson*, 3 Duer, 622; S. C., 12 N. Y. Leg. Obs. 120; *Arding v. Flower*, 8 Term R. 534. And the rule is the same whether the party is attending, going to, or returning from the court, whether as a witness in his own cause or another's, or whether the attendance is strictly in the character of a party. *Id.*; *Clark v. Grant*, 2 Wend. 257; *Salhinger v. Adler*, 2 Rob. 704.

A liberal construction must be given to "attendance upon court," as the term is used in the books, and also to the terms

Voters on election day — Females.

"going" and "returning" from court. *Salhinger v. Adler*, 2 Rob. 704. Thus, where a plaintiff attends in good faith a court where his cause is to be tried, even before the actual day of trial, he will be privileged from arrest. *Childerston v. Barrett*, 11 East, 439. See *Meekins v. Smith*, 1 H. Bla. 636. So, although a party or witness may waive his privilege of exemption by deviating from a direct route on his return home, if for the purpose of attending to other business, yet liberality must be exercised in all cases as to the reasonableness of the time allowed for going or returning, and the burden of establishing a deviation rests upon the arresting party. *Salhinger v. Adler*, 2 Rob. 704; *Selby v. Hills*, 8 Bing. 166; *Willingham v. Matthews*, 6 Taunt. 356.

The exemption from arrest is not limited to attendance upon court, but extends to any legal proceeding before any officer where such attendance is necessary or may be compelled. Thus parties or witnesses are exempt from arrest while attending before a referee. *Clark v. Grant*, 2 Wend. 257. So when attending before arbitrators under a rule of the court. *Randall v. Gurney*, 3 Barn. & Ald. 252; *Webb v. Taylor*, 1 Dowl. & L. 676; *Sanford v. Chase*, 3 Cow. 381. A person attending court for the purpose of justifying as bail is exempt from arrest. *Rimmer v. Green*, 1 Maule & Selw. 638. So a person attending court for the purpose of opposing an insolvent's discharge is privileged. *Willingham v. Matthews*, 6 Taunt. 356; *Arding v. Flower*, 8 Term R. 534; *Ex parte Parker*, 3 Ves. Jr. 554; *Ex parte Donlevey*, 7 Ves. 317.

Grand or petit jurors are protected from arrest, and are entitled to the same privileges as parties or witnesses while going to court, or in attendance, or returning therefrom. *McNeil's Case*, 3 Mass. 288; *Brookes v. Chesley*, 4 Har. & McHen. 295; *Edme's Case*, 9 Serg. & R. 147, 151.

h. Voters on election day. Voters at any election or town meeting are exempt from arrest on the day of such election or town meeting, while in the town where they are entitled to vote. 1 R. S. 126 (116), § 4; *id.* 342 (315), § 10. And any process served on a voter on such day is void. *Weeks v. Noxon*, 1 Abb. 280; S. C., 11 How. 189; *Bierce v. Smith*, 2 Abb. 411.

i. Females. A married woman is privileged from arrest in all civil actions. *Anonymous*, 8 How. 134; S. C., 1 Duer, 613; *Schaus v. Putscher*, 25 How. 463; S. C., 16 Abb. 353, note; *Baldwin*

Previous arrest.

v. *Kimmel*, id. 353; S. C., 1 Rob. 109. And no female can be arrested in any civil action except for a willful injury to person, character, or property. Code, § 179, subd. 5. A female cannot be arrested in an action for a breach of marriage promise. *Siefke v. Tappy*, 3 Code R. 23. Nor for fraudulently contracting a debt. *Wheeler v. Hartwell*, 4 Bosw. 684. Nor for the wrongful conversion of personal property. *Tracy v. Leland*, 2 Sandf. 729; S. C., 3 Code R. 47; 8 N. Y. Leg. Obs. 234; *Hovey v. Starr*, 42 Barb. 435. The decisions are uniform in establishing the rule that the Code has restored the old common-law rule so far as the arrest of a female is concerned, and that the term "willful," as applied to an injury to person, character or property, must be construed strictly. *Ib.*

j. Previous arrest. It is a legal maxim that no man shall be twice arrested for the same cause, and although not universally true, is a general rule to which there are but few exceptions. Thus, when a party has been once arrested in a suit and discharged for insufficiency in the affidavits upon which the order of arrest was granted, he is absolutely exempt from further arrest by the same party in the same action. *Enoch v. Ernst*, 21 How. 96. So a previous arrest in an action exempts the defendant from arrest in another action, if for the same cause, although the second action is brought in a different court, and under a different form. *American Flask Co. v. Son*, 7 Rob. 233; S. C., 3 Abb. N. S. 333; *Wright v. Ritterman*, 1 id. 428; S. C., 4 Rob. 704; *People v. Kelley*, 1 Abb. N. S. 432; *Hernandez v. Carnobeli*, 10 How. 433; S. C., 4 Duer, 642; *Housin v. Barrow*, 6 Term R. 218; *Imlay v. Ellefsen*, 3 East, 309. And where a defendant has been arrested and discharged under the provisions of the Code, he cannot be re-arrested for the same cause of action under the non-imprisonment act. *Matter of Johnson*, 7 Rob. 269. So an arrest made before a cause of action has accrued will privilege the party so arrested from a second arrest for the same cause in another action commenced after the cause of action has accrued and after the discontinuance of the former action. *Wheelright v. Joseph*, 5 Maule & Selw. 93.

It is a well-settled rule that when an arrest has been procured by means of any trick or fraud, the party so arrested will be discharged on motion. *Benninghoff v. Oswald*, 37 How. 235; *Metcalf v. Clark*, 41 Barb. 45; *Carpenter v. Spooner*, 2 Sandf. 717;

Previous arrest.

S. C., 2 Code R. 140; *Goupil v. Simonson*, 3 Abb. 474. And if such fraudulent arrest was procured for the purpose of detaining the party arrested within the jurisdiction of the court until an arrest could be made under a valid process, the second arrest will be also void. *Wells v. Gurney*, 8 Barn. & Cres. 769; *Snelling v. Watrous*, 2 Paige, 314; *Williams v. Bacon*, 10 Wend. 636; *Benninghoff v. Oswell*, 37 How. 235. Thus where a party is arrested under an alleged criminal charge for the purpose of obtaining jurisdiction of his person, he will be exempt from an arrest on civil process at the suit of the party procuring the fraudulent arrest. *Ib.* And it is a general rule when a party is imprisoned upon void process he cannot be continued in custody under a legal detainer. *Attorney-General v. Cases*, 11 Price, 345; *Attorney-General v. Dorkins*, *id.* 156; *Birch v. Prodger*, 1 Bos. & Pul. N. R. 135.

But it does not follow that where a party has been arrested on a criminal charge preferred in good faith, he is on that account exempt from arrest on civil process for the same cause of action, while going to or returning from the place of trial. A person acquitted under a criminal charge is not privileged from arrest while remaining at, or returning from, the place of trial. *Hare v. Hyde*, 16 Q. B. 394; S. C., 3 Law and Eq. 435; *Williams v. Bacon*, 10 Wend. 636. Neither is he so privileged when convicted on such charge. *Lucas v. Albee*, 1 Denio, 666. In either case the criminal action is at an end and the party so convicted or acquitted is liable to arrest on civil process.

But the defendant in a criminal action is privileged from arrest while going to, remaining at, or returning from the place of trial until the cause is finally determined by an acquittal or a conviction. *Gilpin v. Cohen*, 4 Law R. Exch. 131. When this result is reached the exemption ceases. *Ib.*

The rule that a party discharged from arrest on the ground of the insufficiency of the affidavits on which the order was allowed is exempt from further arrest, applies only to the parties thereto, and does not affect any third parties not in collusion with the arresting party. *Barclay v. Faber*, 2 Barn. and Ald. 743. A person who has been discharged from an arrest made when he was temporarily exempt is not on that account exempt from further arrest on the same process when the exemption ceases. It is the arrest and not the process which is void. And the party so arrested and discharged may be again arrested by the same

Previous arrest — Actions upon judgments.

officer on the same order after the privilege has expired. *Humphrey v. Cummings*, 5 Wend. 90; *Petrie v. Fitzgerald*, 1 Daly, 401; *Sperry v. Willard*, 1 Wend. 32. The maxim that no man shall be twice arrested for the same cause is not universally true. The rule is applicable only to arrests made within the same jurisdiction. Thus, a person who has been arrested in another State and discharged from punishment under the laws of another State, may be arrested and held to bail here for the same cause of action at the suit of the same plaintiff. *Peck v. Hozier*, 14 Johns. 346. And see note to *Andrews v. Heriott*, 4 Cow. 508; *Peel v. Elliott*, 28 Barb. 200; S. C., 7 Abb. 433; 16 How. 484.

The decisions of the English courts furnish some important modifications to the general rule that a defendant once arrested and discharged is exempt from arrest a second time. These exceptions allowing a second arrest are: 1. Where a defendant obtained his discharge through fraud, or on conditions not subsequently performed. *Cantellow v. Trueman*, 2 Dowl. P. C. 2; *Puckford v. Maxwell*, 6 Term R. 52; *Olmius v. Delany*, 2 Strange, 1216. 2. Where a defendant obtained his discharge through fault of the officer, or mistake of the plaintiff's attorney, or some act for which the plaintiff was in no way responsible. *Housin v. Barrow*, 6 Term R. 218; *Penfold v. Maxwell*, 1 Chitty, 275, note; *Molling v. Buckholtz*, 3 Maule & Selw. 153; *White v. Gompertz*, 5 Barn. & Ald. 905; S. C., 1 Dowl. & Ry. 555. It is a rule of the English courts that when a defendant has been discharged on account of the *laches* of the plaintiff he is exempt from arrest in suit instituted for the same cause of action. *Wheelwright v. Joseph*, 5 Maule & Selw. 93; *Imlay v. Ellefsen*, 3 East, 309. See, however, *Peck v. Hozier*, 14 Johns. 346.

k. Actions upon judgments. A judgment rendered in a court of this State becomes an express contract of record, in which are merged all the original causes of action. *Suydams v. Barber*, 18 N. Y. (4 Smith) 468; *Mallory v. Leach*, 23 How. 507; S. C., 14 Abb. 449, note; *McButt v. Hirsch*, 4 id. 441; *Goodrich v. Dunbar*, 17 Barb. 644; *Greenbaum v. Stein*, 2 Daly, 223; *Besley v. Palmer*, 1 Hill, 482; *Mills v. Duryee*, 7 Cranch, 481; *Hampton v. M'Connel*, 3 Wheat. 234. As the original causes of action are merged and extinguished by the judgment, a defendant in an action upon such judgment cannot be arrested and held to bail, whatever may have been the character of the original demand.

Actions upon judgments.

Ib. As to the former practice, see 2 R. S. 348 (359), § 7, sub. 1. This rule, however, goes no further. The consequences of a judgment, in respect to its effect as a merger or extinguishment of the original demand, are a part of the law under which the judgment itself is rendered, in the same manner as are those other common consequences of judgments, that a party may have execution upon them, and that they are not re-examinable on the merits of the controversy determined by them. In all these particulars, the effect of a judgment in the government where it is rendered is the subject of positive regulation by that government. *Suydam v. Barber*, 18 N. Y. (4 Smith) 468; *Goodrich v. Dunbar*, 17 Barb. 644; *Besley v. Palmer*, 1 Hill, 482. The effect of a judgment rendered in another State being thus determined by the law of that State, it becomes the duty of the courts of this State to give such judgment the same force and effect in any action founded thereon, as the constitution of the United States, by forbidding any State to pass any law that may impair the obligation of contracts, equally denies any effect to a State regulation which would indirectly impair the obligation of the original contract, by saying that it is merged in the judgment. *Suydam v. Barber*, 18 N. Y. (4 Smith) 468; *Goodrich v. Dunbar*, 17 Barb. 644. And see note to *Andrews v. Herriott*, 4 Cow. 508, 523. Thus, if by the laws of another State a cause of action is merged in a judgment, an action upon such judgment in the courts of this State will be treated as an action upon an express contract of record, and the defendant in such action will be absolutely exempt from arrest, so far as liabilities arising out of the original cause of action are concerned. If, on the other hand, the original cause of action is not merged in a judgment by the law of the State where it was rendered, it will not be considered as so merged here, and in an action founded upon such judgment the defendant will be liable to arrest for any fraud in the original contract to the same extent as if no judgment had been rendered. Ib. But, in the absence of any proof that the original cause of action is not merged in a judgment by the laws of the State where such judgment was rendered, the court will assume that the law of such State does not differ from the law of this State in respect to such merger, and a defendant in an action upon such judgment will be exempt from arrest. See *Suydam v. Barber*, 18 N. Y. (4 Smith) 468; *Goodrich v. Dunbar*, 17 Barb. 644; *Besley v. Palmer*, 1 Hill, 482.

 Actions between partners—Waiver of exemption.

But a *foreign* judgment is never conclusive between the parties, and a person who has recovered a judgment upon a cause of action in a foreign court may afterward, at his election, sue in the courts of this State upon the judgment so recovered, or upon the original cause of action. *Arthurton v. Dalley*, 20 How. 311. See *Peel v. Elliott*, 16 id. 485; S. C., 28 Barb. 200; 7 Abb. 433; *Greenbaum v. Stein*, 2 Daly, 223; see note to *Andrews v. Herriott*, 4 Cow. 510. And where a judgment or decree of a foreign tribunal shows that it was for funds embezzled or misapplied by the defendant acting in a fiduciary capacity, the plaintiff may rely upon the original cause of action in bringing his action here, and causing the defendant's arrest. *Arthurton v. Dalley*, 20 How. 311.

l. Actions between partners. In actions between partners, neither can be arrested at the suit of the other. If the partnership capital be misappropriated, no remedy is furnished in an action at law unless a balance be struck and a promise to pay given; and, in that case, the action would be based upon the promise and not on the fraud. *Smith v. Small*, 54 Barb. 223; *Cary v. Williams*, 1 Duer, 667.

m. Waiver of exemption. Wherever the State or federal laws have conferred the right of exemption from arrest, from motives of public policy, and not as a matter of convenience to the individual, the person on whom such right has been conferred cannot waive such privilege. See *Valarino v. Thompson*, 7 N. Y. (3 Seld.) 576; *Davis v. Packard*, 7 Pet. 276.

But wherever such privilege is personal, as in case of a witness, sheriff or attorney, it may be waived by act of the parties. *Pollard v. Union Pacific Railroad Company*, 7 Abb. N. S. 70; *Stewart v. Howard*, 15 Barb. 26; *Cole v. McClellan*, 4 Hill, 59; *Brown v. Getchell*, 11 Mass. 11, 14.

So, where a plaintiff has a clear and undeniable right to arrest the defendant, for a cause of action falling under one of the classes of cases in which this right is expressly given by the Code, or by the non-imprisonment act, he may waive his right to the provisional remedy, by joining with the cause of action for which the right to arrest is given, causes of action to which no provisional remedy can be extended. Thus, where a complaint combines a cause of action arising from a failure to pay over money received by an agent in a fiduciary capacity, with a cause of action arising on contract, and for which no arrest can

In what cases an arrest may be made.

be had, the right to arrest for the former cause of action will be destroyed by its improper joinder with the latter cause of action. *Lambert v. Snow*, 9 Abb. 91; S. C., 17 How. 517; 2 Hilt. 501. Neither can an order of arrest be maintained where the complaint sets forth a cause of action for damages for the fraud and deceit of the defendant in obtaining goods on credit, joined with a cause of action on the promissory notes given by the defendant in the same transaction. *Brown v. Ashbough*, 40 How. 226. And, in general, if there is one principal cause of action in the complaint which will not justify an order of arrest, it will be vacated on the application of the party against whom it is made. *Ely v. Steigler*, 9 Abb. N. S. 35. See *Robinson v. Flint*, 16 How. 240; *Redfield v. Frear*, 9 Abb. N. S. 449; *Petrie v. Fitzgerald*, 1 Daly, 401.

ARTICLE IV.

IN WHAT CASES AN ARREST MAY BE MADE.

Section 1. Under the non-imprisonment act.

a. Promise to marry. Any male defendant is liable to an arrest in an action for damages for a breach of marriage promise, under the exception to the general application of the non-imprisonment act, contained in chapter 300, section 2 of the laws of 1831. Prior to the passage of this act any defendant was liable to arrest in any action on contract; and, by the provisions of the second section of the act, the former practice was retained in force so far as it applies to remedies allowed in actions of this nature.

b. Fines and penalties. The same section of this act authorizes the arrest of a defendant in an action for a fine or a penalty.

c. Money collected by public officer. Public officers, also, are liable to arrest in actions against them for moneys collected in an official capacity. And this liability attaches whether the cause of action arose in a foreign country, and by the act of an agent or officer of that country, or by an officer of this State. *Peel v. Elliott*, 16 How. 485; S. C., 28 Barb. 200; 7 Abb. 433; *Republic of Mexico v. Arangoiz*, 5 Duer, 643. As to who are public officers see 1 R. S. 95 (86).

d. Misconduct in office. So, also, public officers are liable to arrest for any misconduct or neglect in office. Laws of 1831, ch. 300, § 2. To this general liability of public officers to arrest for

Misconduct or neglect in professional employment.

misconduct or neglect in office there is one exception. Commissioners, superintendents of repairs and collectors on any canal are exempt from arrest in any civil suit for any act done or omitted to be done in the exercise of official duty. 1 R. S. 224, § 43.

e. Misconduct or neglect in professional employment. Misconduct or neglect in professional employment was also allowed to remain a ground on which to base an order of arrest under the non-imprisonment act. See Laws of 1831, ch. 300, § 2. The non-payment of money collected by an attorney, for his client, falls within the meaning of this provision of the statute. *Stage v. Stevens*, 1 Denio, 267, overruling *Bohanan v. Peterson*, 9 Wend. 503.

f. Non-payment of costs, etc. By the laws of 1847, chapter 390, section 2, it is provided that no person shall be imprisoned for non-payment of interlocutory costs, or for contempt of court in not paying costs, *except* attorneys, solicitors and counselors and officers of court, when ordered to pay costs for misconduct as such, and witnesses, when ordered to pay costs on attachment for non-attendance. See *Gardner v. Tyler*, 5 Abb. N. S. 33; S. C., 36 How. 62; *Buzard v. Gross*, 4 How. 23; *Vreeland v. Hughes*, 2 Code R. 42; *Giles v. Halbert*, 12 N. Y. (2 Kern.) 32. As a substitute for such imprisonment, the third section gives authority for the issuing of process in the nature of a *feri facias*, to be enforced against the personal property of the party liable for such costs. *Ib.*

But a judgment debtor may be committed for a general contempt in supplementary proceedings, as for the non-payment of a judgment and costs under an order previously granted. The act abolishing imprisonment for non-payment of costs does not apply to such cases. *People ex rel. Kearney v. Kelley*, 22 How. 309; S. C., sub. nom. *Kearney's Case*, 13 Abb. 459. See also "Contempts," *post*.

g. Suit pending or judgment obtained. The right to arrest in the cases mentioned in the preceding sections was not given by the non-imprisonment act, but was allowed to remain as it previously existed under the Revised Statutes, by the exceptions to the general provisions of that act contained in section 2. The third section provides for the arrest of a defendant in all cases where, by the preceding provisions of the act, no arrest could be made, but limits the remedy to cases where a suit has

Suit pending or judgment obtained.

been commenced, or a judgment or decree obtained in a court of record. By the amendment of this act in 1838, an arrest can be had on a judgment rendered in a justice's court, as well as in a court of record, provided the judgment exceeds the sum of \$25, exclusive of costs, and a transcript thereof has been filed and docketed in the clerk's office, as provided by statute. Laws of 1838, ch. 138, § 1. The same effect was subsequently given to judgments rendered before the justices' courts of the cities of Albany, Troy and Hudson. Laws of 1848, ch. 48. Before a warrant to arrest the defendant can issue, satisfactory evidence must be given *by affidavit* to the officer to whom application is made, showing that there is a debt or demand due to the plaintiff from the defendant, amounting to more than \$25, exclusive of costs, specifying the nature and amount thereof as near as may be, and that the defendant *cannot, according to the provisions of this act, be arrested or imprisoned*. Laws of 1838, ch. 138, § 2. See *Broadhead v. McConnell*, 3 Barb. 175; *Matter of Johnson*, 7 Rob. 269; *Green v. Gonzales*, 2 Daly, 412. So, one or more of the following particulars must be established:

1. That the defendant is about to remove any of his property out of the jurisdiction of the court in which such suit is brought, with intent to defraud his creditors. *Vredenburg v. Hendricks*, 17 Barb. 179; or,

2. That the defendant has property or rights in action which he fraudulently conceals; or that he has rights in action, or some interest in any public or corporate stock, money or evidences of debt, which he unjustly refuses to apply to the payment of any judgment or decree which shall have been rendered against him, belonging to the complainant. *People v. Recorder of Albany*, 6 Hill, 429;

3. That he has assigned, or removed, or disposed of, or is about to dispose of, any of his property, with intent to defraud his creditors; or,

4. That the defendant fraudulently contracted the debt or incurred the obligation respecting which such suit is brought. *People v. Recorder of Albany*, 6 Hill, 429.

Whenever these facts are established to the satisfaction of the officer to whom the application is addressed, a warrant may issue for the arrest of the defendant, and the defendant be arrested thereon.

But these facts must appear by affidavit, and that affidavit

Trove or conversion of property.

must contain *evidence* which, in the judgment of the officer, amounts to *proof* of the charge. *Vredenburgh v. Hendricks*, 17 Barb. 179; *Broadhead v. McConnell*, 3 id. 175; *Green v. Gonzales*, 2 Daly, 412. And before a warrant can be granted under this act, it must appear that the defendant is not, and cannot be arrested and imprisoned in the action on mesne process. *Matter of Johnson*, 7 Rob. 269.

The assignee of a judgment rendered in an action founded on fraud has all the rights to remedies possessed by the original creditor. The act gives the remedy to the *plaintiff*; and where the relation of the parties remains the same, and the cause of action has not been substantially changed, the right to the remedies given in the action pass to the assignee. *King v. Kirby*, 28 Barb. 49.

h. Trove or conversion of property. The act of 1831 applied only to actions arising on contracts. Therefore actions in form *ex delicto* are in general not affected by this act, but remain as under the Revised Statutes.

Under the Revised Statutes the defendant in an action of trove, or conversion of personal property, could be arrested as of course, and the rule has not been changed by subsequent legislation; 2 R. S. 348 (359), § 7, except that an order of arrest is necessary. See Order of Arrest.

i. Trespass in taking personal property. The same rule applies to trespass for the taking of personal property. This, under the old practice, was a bailable action, and as such it now remains. 2 R. S. 348 (359), § 7.

j. Replevin. Whenever a plaintiff can maintain an action of replevin he can also maintain an arrest of the defendant. This action and its accompanying remedies were not affected by the act of 1831. 2 R. S. 348 (359), § 7.

k. Trespass upon land. The same section of the Revised Statutes gives the right to arrest in actions for trespass upon lands.

Section 3. Arrest under the provisions of the Code.

a. Non-residents and persons about to remove. The first clause of the first subdivision of section 179 relates to the arrest of non-residents or of persons about to remove from the State. All the other cases mentioned in the first subdivision of this section relate to all defendants, whether residents, non-residents or persons about to remove from the State. Where a non-

 Actions not arising out of contract.

resident or a person about to remove is to be arrested, there must be three circumstances or facts regarded: 1. The cause of action must be one not arising out of contract; 2. The action must be for damages; and 3. The defendant must be a non-resident of the State, or about to remove therefrom. What constitutes a cause of action not arising out of contract, and who is a resident or a non-resident, will be hereafter discussed.

b. Actions not arising out of contract. Under the former practice in actions at law, actions were divided into such as were called *ex contractu*, or such as were termed *ex delicto*. It is only the latter class of actions that will be noticed in this place.

Actions in form *ex delicto* comprised replevin, trespass, and trespass on the case. The action of trespass on the case was a universal remedy given by the statute of Westm. 2, 13 Edw. I, for all personal wrongs or injuries committed with or without force, whether occasioned by malfeasance, non-feasance, or misfeasance. Trover, slander and malicious prosecution were three forms of this remedy in the nature of distinct actions. In all the actions embraced within this general classification, an arrest may be allowed under such conditions as are prescribed by the first subdivision before mentioned.

These include, actions for damages for assault and battery, for libel, for slander; *Davis v. Scott*, 15 Abb. 127; *Knickerbocker Life Insurance Company v. Ecclesine*, 6 Abb. N. S. 9, 23; actions against an innkeeper for the loss of the baggage of his guests; *People v. Willett*, 6 Abb. 37; S. C., 26 Barb. 78; 15 How. 210; actions against common carriers for damages resulting from carelessness, negligence, and improper conduct. *Burkle v. Ells*, 4 How. 287; S. C., 2 Code R. 148; actions for criminal conversation; *Delamater v. Russell*, 4 How. 234; S. C., 2 Code R. 147; *Straus v. Schwarzwalden*, 4 Bosw. 627; or seduction; *Taylor v. North*, 3 Code R. 9; or an action for a limited divorce on the ground of cruel and inhuman treatment. *M'Intosh v. M'Intosh*, 12 How. 289; and actions for false and fraudulent representations of the means and pecuniary ability of a third person, whereby the plaintiff was induced to sell and deliver goods on credit to such third person, to the plaintiff's damage. *Smith v. Corbiere*, 3 Bosw. 634. Previous to the amendment of the Code in 1863, this latter action must have been brought under this first subdivision in order to secure the right to arrest the defendant. But since the addition to subdi-

Residence, domicile, etc.

vision four of the clause "or when the action is brought to recover damages for fraud or deceit," the action may be brought under this latter subdivision without regard to the question of residence. *Hazlett v. Gill*, 19 Abb. 353; S. C., 4 Rob. 627; *Redfield v. Frear*, 9 Abb. N. S. 449.

And generally where, under the old practice, the right to arrest was given in actions not arising on contract, or in actions sounding in tort, the same right remains under the first subdivision of section 179.

c. Residence, domicile, etc. It is not easy in all cases to determine what is to be construed as a *residence* within the meaning of the Code. The terms "residence" and "non-residence" are invariably used in the Code, while in the Revised Statutes the terms "residence," "domicile" and "inhabitaney" are not used indiscriminately, but had each a definite, legal signification. See *Crawford v. Wilson*, 4 Barb. 504, 522; *Roosevelt v. Kellogg*, 20 Johns. 210; *Thorndyke v. City of Boston*, 1 Metc. 245; *Houghton v. Ault*, 16 How. 77, 85; S. C., 8 Abb. 89, note; S. C. affirmed, 25 How. 593, *n*; *Chaine v. Wilson*, 8 id. 78; S. C., 1 Bosw. 673. Bouvier defines "residence" as personal presence in a fixed and permanent abode. This is in accordance with the spirit of the decisions upon which the old rule regarding residence was based. Personal presence, or what may be termed *actual* residence, was essential to the strict legal significance of the term. *Haggart v. Morgan*, 4 Sandf. 198; *In the Matter of Thompson*, 1 Wend. 43; *Frost v. Brisbin*, 19 id. 11. In these cases the rule is distinctly laid down that a person may be a non-resident within the meaning of the statutes relating to provisional remedies while he has a domicile within the State.

Two things must concur to constitute domicile: first, residence, and secondly, the intention of making it the home of the party. There must be the fact and the intent. *Ennis v. Smith*, 14 How. U. S. 400. See Story on Conf. of Laws, § 44.

The old rule that the term "residence" should be construed liberally in favor of creditors has no existence under the Code, as the necessity for such rule no longer exists, and where in the provisional remedies of the Code the term *resident* or *residence* is used, the term must be construed to mean a legal residence. *Houghton v. Ault*, 16 How. 77; S. C., 8 Abb. 89, note; S. C. affirmed, 25 How. 593, *n*. And it is safe to say that, under the present practice, the same facts that determine where or what is

a "domicile" will also apply to a residence. *Chaine v. Wilson*, 8 Abb. 78; S. C., 1 Bosw. 673; *Barry v. Brockover*, 6 Abb. 374; *Crawford v. Wilson*, 4 Barb. 504, 522.

In the case last cited many of the decisions on these questions are collected and after a careful comparison of authorities, the conclusion is arrived at that from the various definitions of the terms "residence," "inhabitaney" and "domicile," the proposition may be deduced that the terms "legal residence" or "inhabitaney" and "domicile" mean one and the same thing. That legal residence means the place of a man's fixed habitation, where his political rights are to be exercised, and where he is liable to taxation. See *Houghton v. Ault*, 16 How. 85; S. C., 8 Abb. 89, note. Ordinarily, one's residence and domicile (if they do not always mean the same thing) are in fact the same, and where they so concur, they are that place which is in ordinary language called *home*. And it may safely be asserted that where a person has a home, as that term is ordinarily used and understood among men, and he habitually resorts to that place for comfort, rest and relaxation from the cares of business, and for restoration to health, and there abides in the intervals when business does not call, that is his residence both in the common and the legal meaning of the term. *Chaine v. Wilson*, 8 Abb. 78; S. C., 1 Bosw. 673; *Matter of Hawley*, 1 Daly, 531.

The following general rules apply equally to residence or domicile, as the term "residence" is used in relation to the provisional remedies given by the Code. Every person must have a domicile somewhere, and can have but one, for the same purpose, at one and the same time. *Abington v. North Bridgewater*, 23 Pick. 170; *Crawford v. Wilson*, 4 Barb. 504. Every person has a domicile of origin, which he retains until he acquires another, and the one thus acquired is in like manner retained. The place of birth is the domicile of origin; and, as a general rule, minors have, at all times, the same domicile as their parents. *Crawford v. Wilson*, 4 Barb. 504. A married woman follows the domicile of her husband, and usually a change of the domicile of husband changes that of the wife. But if separated by a decree of a competent court, and the wife remains in the same place, that presumption is rebutted as to any new domicile acquired by the husband. *Vischer v. Vischer*, 12 Barb. 640. A widow retains the domicile of a deceased husband until she obtains another. *Greene v. Greene*, 11 Pick. 409; *Mifflin*

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Township v. Elizabeth, 18 Penn. St. 17. Being at a place is *prima facie* evidence of domicile. *Guier v. O'Donnell*, 1 Binn. 349. This presumption may, however, be rebutted. *Bruce v. Bruce*, 2 Bos. & Pul. 230, *n.* But the burden of proof in such cases lies on the party seeking to rebut the presumption. *Ib.*

As to what constitutes a change of domicile no certain rule can be given which will be equally applicable to all cases. It requires no certain length of time, as length of time alone is not sufficient to constitute a change of domicile. There must be a *bona fide* and permanent intent, *facto et animo*. Until these concur the old domicile remains. *Chaine v. Wilson*, 8 Abb. 78; S. C., 1 Bosw. 673; *Brown v. Ashbough*, 40 How. 260; *Vischer v. Vischer*, 12 Barb. 640; *Somerville v. Somerville*, 5 Ves. 750; and where a person has two establishments in different States, and resides in each during different portions of the year, the question as to which establishment is the legal domicile must be decided by the intention of the party; as evidenced by his acts or declarations. *Chaine v. Wilson*, 8 Abb. 78; S. C., 1 Bosw. 673; *Hegeman v. Fox*, 31 Barb. 475; and where a married man does business in one place and has a family living in another, his domicile is where his family habitually reside; and, in general, when the fact of a residence has been once ascertained or conceded, it is deemed to continue until there is proof of a change of location, with intent to make such location a new home, with a fixed purpose to remain, and without a present intention to return when some temporary purpose is accomplished; and a mere intent to change such residence, coupled with the sincere belief that such change has been effected, will not be sufficient to constitute such change unless the intent and the fact concur. *Ib.*; *Somerville v. Somerville*, 5 Ves. 787; *Munroe v. Douglas*, 5 Mad. 379, 405; *Bruce v. Bruce*, 2 Bos. & Pul. 231, note.

A person cannot become a non-resident by being temporarily absent from the State, nor can he become a resident by being temporarily within it. *Hurlbut v. Seeley*, 11 How. 507; S. C., 2 Abb. 138; *Boardman v. House*, 18 Wend. 512. Thus, absence from the State as a volunteer in the army of the United States does not render a person a non-resident, as it is impossible for a person so circumstanced to acquire a residence elsewhere. *Tibbitts v. Townsend*, 15 Abb. 221.

So, also, a mariner cannot be deemed to have abandoned his

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residence in this State, while engaged as a mariner upon the ocean. The rule is substantially the same in this, as in other cases. The residence of a seaman, if married, is the place where his family dwells, or, if unmarried, the place where his domicile was fixed when he first went to sea as a mariner. *Matter of Scott*, 1 Daly, 534; *Matter of Bye*, 2 id. 525.

Numerous cases might be cited from the English and American reports illustrative of the general principles here given. But as frequent references are made to them in the cases already cited, further space need not be devoted to their collection.

d. Removal from State. The other condition upon which a defendant can be arrested on an action not arising on contract under the first clause of the first subdivision of section 179 is, that the defendant is about to remove from the State. This intended removal must amount, in point of fact, to an intention to immediately depart from the State for the purpose of establishing a new domicile or residence elsewhere. It must be an intent to remain permanently and, without any intent to return. If a defendant is arrested on an order under the first clause of the first subdivision, based on an affidavit that fails to establish these essential facts, the order of arrest will, on application, be revoked. *Brophy v. Rodgers*, 7 N. Y. Leg. Obs. 152. See also *Brooks v. McLellan*, 1 Barb. 247; *Hargreaves v. Hayes*, 30 Eng. L. & Eq. 272; *Davis v. Scott*, 15 Abb. 127.

e. Injury to person, whether defendant be a resident or a non-resident. Another class of cases, in which a remedy by arrest is given under the first subdivision of section 179, is in actions for injuries to the person.

These injuries may extend to the absolute, or the relative rights. They may consist in injuries to the right of personal security, as by assault, assault and battery, or rape, or for injuries occasioned by carelessness or negligence, or injuries to health, as by nuisance, or by the neglect of a physician, or of an injury to reputation, by slander, libel or malicious prosecution, or injuries to personal liberty by false imprisonment.

Under the head of relative rights, are embraced the various injuries that may be offered to a person in the relation of husband, parent, guardian or master, by criminal conversation, seduction, abduction, beating or other ill usage of a wife, child, ward or servant. For any of these injuries to the person, the defendant is liable to arrest.

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But in actions of assault and battery, it has been held that the courts will hesitate to grant an order of arrest unless the defendant is a non-resident, or is about to remove from the State, or unless in extreme cases of outrageous batteries. *Davis v. Scott*, 15 Abb. 127; *Knickerbocker Life Insurance Company v. Ecclesine*, 6 Abb. N. S. 9, 23.

In an action for a false imprisonment, the defendant may be arrested, and the order maintained, unless it appears that the plaintiff, in the original action, had a reasonable cause for the arrest. When such fact appears, no arrest can be maintained in the action for false imprisonment, even if, under the rules of evidence, only nominal damages could be recovered in the original action. *Gordon v. Upham*, 4 E. D. Smith, 9. So, where a party has, in good faith, merely stated his case to a magistrate, and that officer thereon erroneously causes the arrest of a third party against whom no arrest can be maintained, such action, on the part of the party making the complaint, does not render him liable to an action for false imprisonment, or to an arrest at the suit of the party so aggrieved. *Von Latham v. Rowan*, 17 Abb. 237; S. C., 38 Barb. 339, sub nom. *Von Latham v. Libby*.

In an action for a limited divorce on the ground of cruel and inhuman treatment, the defendant may be arrested, as this action comes clearly within the definition of injuries to the person. An action for a divorce on the ground of adultery is not, however, an injury to person or character within the meaning of section 179, subdivision 1 of the Code. *M'Intosh v. M'Intosh*, 12 How. 289.

The right to arrest a defendant in actions for injuries to the relative rights of the person is well established under the Code. Thus an order for the arrest of a defendant has been allowed in an action for criminal conversation with the plaintiff's wife. *Delamater v. Russell*, 4 How. 234; S. C., 2 Code R. 147; *Straus v. Schwarzwalden*, 4 Bosw. 627.

So the order has been allowed in an action for the seduction of the plaintiff's daughter. *Taylor v. North*, 3 Code R. 9. And the general rule has been laid down that the right of arrest exists in every case of constructive injury to the plaintiff, arising out of the relation of master and servant, parent and child, or guardian and ward. *Delamater v. Russell*, 4 How. 334; S. C., 2 Code R. 147; and see 2 Kent's Com. 39; 3 Bla. Com. 139.

f. Injuries to character. Under the head of injuries to character may be classed all actions for slander, libel and malicious

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prosecution. But it has been held that an order of arrest will not be allowed in every case in which the Code provides that the order may issue. That the granting of the order is in all cases discretionary, and it is only where the defendant is a non-resident or a transient person that an order of arrest will be granted in an action for slander or libel. *Davis v. Scott*, 15 Abb. 127; *Knickerbocker Life Ins. Co. v. Ecclesine*, 6 Abb. N. S. 9, 23. In actions for malicious prosecution, the courts require that the facts set forth in the affidavit shall be *prima facie* evidence of a want of probable cause, or the order of arrest will be vacated and the defendant discharged. *Vanderpool v. Kissam*, 4 Sandf. 715. See *Roberts v. Bayles*, 1 id. 47; *Bulkley v. Keteltas*, 6 N. Y. (2 Seld.) 384.

g. Injuring, taking, detaining or converting personal property. Under the provisions of the Code, as under the former practice, the defendant may be arrested for injuring, or for wrongfully taking, detaining or converting property. Code, § 179, subd. 1.

The word "property," as used in the Code, includes property real and personal. Code, § 464. But as the word is used in subdivision 1 of section 179 of the Code, its meaning is limited to personal property only. The word *detaining*, if used alone, might be applied to real estate; but the expressions "injuring," "taking" and "converting," are used in the same sentence, and apply to the same subject-matter, and these expressions cannot be applied to real property. Therefore, it is evident that the Code furnishes no authority for the arrest of a defendant in an action brought against him to recover the possession of real property, with damages for withholding the same. *Merritt v. Carpenter*, 2 Keyes, 462; S. C., 33 How. 428; *Brush v. Mullen*, 12 Abb. 242; *Fullerton v. Fitzgerald*, 10 How. 37; S. C., 18 Barb. 441. Neither does this subdivision of section 179 authorize the arrest of a defendant in an action for the recovery of the possession of personal property. The only provision authorizing an arrest in such cases is to be found in the third subdivision of that section. *Chappel v. Skinner*, 6 How. 338. If the facts necessary to sustain an arrest under this latter subdivision cannot be substantiated by affidavit where a right of action for the recovery of personal property exists, and the arrest of the defendant is for any reason important, it may still be possible to procure the arrest of the defendant in an action to recover damages for the

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taking, detention, or conversion of the property. The advisability of adopting this latter form of action should be carefully considered if the right of election exist, as an election once made will be final, and the plaintiff cannot hold the defendant to bail under the first subdivision of section 179, and afterward have the property delivered to him before judgment under the provisions of sections 208, 211 of the Code. *Chappel v. Skinner*, 6 How. 388.

A plaintiff may be entitled to demand the arrest of a defendant in an action on two or more grounds arising from as many distinct wrongs received at his hands and forming separate causes of action. Thus, he may unite in the same complaint a cause of action for deceit in the sale of personal property, with a cause of action for the taking and conversion of personal property. Both are injuries to property, and the law affords the injured party the same remedy in either case. *Cleveland v. Barrows*, 59 Barb. 364. Fraud in the sale of property is therefore a ground for an arrest under subdivision 1, as well as under subdivision 4 of section 179. *Ib.*

A party to whom property is loaned under an agreement to return the same, or pay for it, within a specified time, becomes liable to an action for a conversion, by so disposing of the property as to be unable to return it, and he is also liable to arrest in such action. The payment of a part of the stipulated price, and the delivery of a note for the balance, will not change the character of the liability to a simple debt, nor operate as a waiver of the liability of the defendant to arrest in an action upon the original cause of action, commenced after the dishonor of the note and its return to the maker. *Person v. Civer*, 29 How. 432; See *Dubois v. Thompson*, 1 Daly, 309; S. C., 25 How. 417.

The election by a creditor to affirm a contract as to a part of the claim will not deprive him of the right to maintain an action for fraud in the contract as to the residue of the claim, and to cause the arrest of the defendant in such action. Neither can an unliquidated demand for damages, arising out of a tortious act, be regarded as a debt within the provisions of the statute authorizing the discharge of insolvent debtors. The arrest may be maintained notwithstanding the discharge. *Zinn v. Ritterman*, 2 Abb. N. S. 261. But, where the cause of action is founded upon a contract, as in case of an action against a carrier for a breach of duty, the plaintiff cannot evade the effect of a dis-

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charge by bringing an action sounding in tort. *Campbell v. Perkins*, 8 N. Y. (4 Seld.) 430.

The fact that the acts relied upon to sustain an action of trover were authorized by the express terms of a contract will not free the defendant from liability to arrest if the contract itself is void.

Thus an action of trover may be maintained and the defendant arrested, where he refuses to return stock pledges left with him as collateral security for a usurious loan, even though he was, by the terms of the contract, authorized to hypothecate the stock and had hypothecated it before such demand was made. The theory of the action is, that the defendant's possession was wrongful from its commencement, and his disposition of the stock tortious; and that the usury vitiated that part of the agreement which authorized him to use, transfer or hypothecate the stock. *Cousland v. Davis*, 4 Bosw. 619. See *Schroepel v. Corning*, 6 N. Y. (2 Seld.) 107. A defendant cannot be arrested under subdivision 5 of section 179, where the offense of disposing of property, with intent to defraud creditors, was committed in a foreign country, and all the parties to the transaction were foreigners. But a different rule exists when the defendant takes the property of another unlawfully in a foreign land and brings it here. In such a case the action is brought for the property, and the right to recover for it here is based, not merely upon a fraud committed abroad, but upon the continued possession of the property obtained through such fraud; and then the act complained of forms the cause of action and not the mere cause for imprisonment. *Blason v. Bruno*, 21 How. 112; S. C., 33 Barb. 520; 12 Abb. 265; *Northern Railway of France v. Carpentier*, 13 How. 222; S. C., 3 Abb. 259; *Brown v. Ashbough*, 40 How. 226. The defendant may be arrested in the latter case, although no arrest could have been made for the same offense in the place where the fraud was committed. *City Bank v. Lumley*, 28 How. 397; *Johnson v. Whitman*, 10 Abb. N. S. 111; *Brown v. Ashbough*, 40 How. 226. See *De Witt v. Buchanan*, 54 Barb. 31. The *lex fori* and not the *lex loci* governs in such cases. *Ib.*

h. Injuries to real property. No arrest can be made under subdivision 1 of section 179, in an action relating to real property. The provisions of this subdivision relate to personal and not to real property. *Merritt v. Carpenter*, 33 How. 428; S. C., 2

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Keyes, 162; *Brush v. Mullen*, 12 Abb. 242; *Fullerton v. Fitzgerald*, 10 How 37; S. C., 18 Barb. 441.

h. Fines or penalties. By the second subdivision of section 179 the defendant is rendered liable to arrest in an action for a fine or penalty. The second section of the non-imprisonment act also retained the right to arrest in actions of this nature, *ante*, 605.

Under the practice as existing in England a distinction is made in regard to the character in which the plaintiff sues, and the right to arrest the defendant is made to depend thereon. As, where the action is brought by the party injured, the statute is remedial; but penal where brought by a common informer. *Bones v. Booth*, 2 W. Bla. 1227. In the first instance, the defendant could be held to bail; but in the latter this right was not allowed. *Turner v. Warren*, 2 Strange, 1079; *Presgrave v. —*, 1 Comyn, 75.

j. Promise to marry. Any male defendant may be arrested in an action to recover damages for a breach of marriage promise. But this right is limited to actions brought by females, for, by subdivision 5, no female can be arrested in any action except for a willful injury to person, character or property. *Siefke v. Tappey*, 3 Code R. 23.

k. Money received or property embezzled by public officer. It is also provided in the same subdivision that public officers, attorneys, solicitors and counselors shall be subject to arrest in an action for money received, or property embezzled or misapplied. Code, § 179, subd. 2.

An attorney is liable to arrest for retaining money received from the defendant in an action, when such money should have been paid to the plaintiff. In such cases an order of arrest will be granted as of course. *Gross v. Graves*, 2 Rob. 707; S. C., 19 Abb. 95. And where an attorney receives money from his client, with instructions to pay it to a third party, and refuses to return it when such instructions are revoked, he is liable to an arrest, although acting in good faith. *Schadle v. Chase*, 16 How. 413. See *Grant v. Chester*, 17 id. 260; S. C., 8 Abb. 357. And, in general, an attorney is liable to an arrest for any violation of professional duty in this regard, whether he be an attorney of this or another State. *Yates v. Blodgett*, 8 How. 278. See *Blason v. Bruno*, 21 id. 112; S. C., 33 Barb. 520; 12 Abb. 265; *City Bank v. Lumley*, 28 How. 397.

So, while a public officer of this State may be arrested for

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money received, or property embezzled or misapplied, the same rule has been applied to officers of a foreign State when prosecuted for a like cause of action in our courts. *Republic of Mexico v. Arrangoiz*, 5 Duer, 604; S. C., 11 How. 1, 576. See *Peel v. Elliott*, 16 id. 481.

l. Money received by officer or agent of corporation or bank. An officer or agent of a corporation or banking association is liable to an arrest in an action for money received, or property embezzled or misapplied, in the course of his employment in such official or representative character.

Under this provision of section 179, the officers and directors of any corporation may be arrested in an action for damages sustained by a stockholder through their fraudulent and illegal acts. *Crook v. Jewett*, 12 How. 19.

So, where the cashier of a moneyed corporation, acting as an officer and agent thereof, abstracts from the possession of the corporation sundry certificates of shares in the stock of such company, sells the same, and embezzles the proceeds, he will be liable to an arrest in an action brought by the corporation for the conversion of such stock. *Northern Railway Company of France v. Carpentier*, 13 How. 222; S. C., 3 Abb. 259.

m. Money or property received in a fiduciary capacity. Subdivision second also provides that, in an action for money received, property embezzled or fraudulently misapplied by any factor, agent, broker or other person in a fiduciary capacity, the defendant shall be liable to an arrest. The application of this remedy depends upon the construction of the word "fiduciary."

The term "fiduciary" involves the idea of trust and confidence. It refers to the integrity and the fidelity of the party trusted, rather than to his credit or ability. It contemplates good faith, rather than legal obligation, as the basis of the transaction. It implies a confidence in the man, rather than in his pecuniary ability to pay. For the abuse of this confidence the law withholds the privileges it confers on other debtors, and adds the liability to arrest. *Stoll v. King*, 8 How. 298. If the principal is entitled to recover back the specific property intrusted to his agent, then the agent is employed in a fiduciary capacity. But, if the agent has the right to receive money or property, and use it as his own, holding himself accountable to his principal for the debt thus created, then the agent is not acting in a fiduciary capacity. *Stoll v. King*, id. 298. In the former case the agent is liable to

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arrest, but in the latter he is not. Where a factor receives money to be invested in a specific thing, and a special condition is added that the money shall not be appropriated to any other purpose, the factor acts in a fiduciary character, and is liable to an arrest for misappropriating such funds. *Noble v. Prescott*, 4 E. D. Smith, 139. The same rule applies to an agent employed to collect money. *Stoll v. King*, 8 How. 298; *Schudder v. Shiells*, 17 id. 420. So an agent, employed to pay money directly to a third person, and neglecting to do so, is liable to arrest on the same ground. *Burhans v. Casey*, 4 Sandf. 707.

A factor is defined to be "An agent employed to sell goods, or merchandise, consigned or delivered to him, by or for his principal, for a compensation, commonly called factorage or commission. Hence, he is often called a commission merchant, or consignee; and when for an additional compensation in case of sale, he undertakes to guarantee to his principal the payment due by the buyer he is said to receive a *del credere* commission." Story on Agency, § 33. The decisions relating to the liability of commission merchants to arrest for a failure to pay over to their principals the money received from sales in the usual course of their business, is somewhat conflicting. The uncertainty heretofore existing had its origin not in the rule itself but in its application. A doubt seemed to exist as to how far the fiduciary capacity could be deemed to extend to the varying conditions arising out of the transactions between the consignor and the consignee. But the application of the rule, as well as the true intent and meaning of this subdivision of section 179 has been definitely settled by the current of authorities. The term "in a fiduciary capacity" tends to show that by factor, agent or broker, is meant one in whom a trust is reposed, such as is usually reposed in those persons in their ordinary or regular business; that is, a trust that they will sell and immediately account for the balance after deducting their commissions; not that they shall take a general charge of their principals' business, pay debts, assume liabilities for them, and then sell their property. *Goodrich v. Dunbar*, 17 Barb. 644; *Schudder v. Shiells*, 17 How. 420; *Turner v. Thompson*, 2 Abb. 444. And wherever the ordinary relations of factor and principal exist, and the factor fails to pay over to his principal the proceeds of the sales of the property consigned to him less his commissions, he is liable to arrest. *Goodrich v. Dunbar*, 17 Barb. 644; *Duguid v. Edwards*, 50 id. 288; *Clark*

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v. *Pinckney*, id. 226; *Schudder v. Sheills*, 17 How. 420; *Ostall v. Brough*, 24 id. 274. But where numerous transactions have taken place, and the conduct of the parties indicates that it was not their intention that the strict relations and obligations of principal and factor should exist between the parties, then the property consigned to the factor for sale would not be received in any other capacity than that of a mere debtor, and the liability to arrest would not attach to such factor on a failure to pay over the proceeds of the sales to the consignor. *Goodrich v. Dunbar*, 17 Barb. 644; *Duguid v. Edwards*, 50 id. 288; *McBurney v. Martin*, 6 Rob. 502; *Angus v. Dunscomb*, 8 How. 14; *Bussing v. Thompson*, 15 id. 97; S. C., 6 Duer, 696. So where by the terms of the agreement between the parties the right is given to mingle the money of the principal with that of the agent, the fiduciary character of the transaction is destroyed, and the right to arrest the agent or factor is destroyed with it. *Bussing v. Thompson*, 15 How. 97; S. C., 6 Duer, 696; *Sutton v. De Camp*, 4 Abb. N. S. 483. And where the factor has a personal interest in the money received and a right to control it independent of any instructions of the owner, or where the credit appears to have been given to the pecuniary responsibility of the factor rather than a confidence placed in his personal character, the right to arrest the debtor is not given by this subdivision of this section of the Code. *McBurney v. Martin*, 6 Rob. 502; *Stoll v. King*, 8 How. 298. But the right of the consignor to the immediate receipt or delivery of the proceeds of the sales made by his factor cannot be defeated without an express or implied understanding that the proceeds shall be differently disposed of; and any advances made by a consignee on the property received gives him no right in the property or the proceeds of its sale, further than a lien to the extent of the advances made. *Duguid v. Edwards*, 50 Barb. 288.

Where a factor receives a *del credere* commission for guaranteeing the sales made by him, the fiduciary relation is not destroyed thereby, and on the receipt of the proceeds of the sale of the property consigned to him he becomes a trustee for his principal, and is liable to arrest for any misappropriation of the funds so held. *Ostall v. Brough*, 24 How. 274. But the factor is not liable to arrest if the purchaser fails to pay for the goods sold to him. The factor is liable to arrest for money received only, and not for money which he has not received, but for

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which he has made himself liable to his principal. *Sutton v. De Camp*, 4 Abb. N. S. 483. See *Angus v. Dunscomb*, 8 How. 14. And, where the action is brought on the contract of guaranty, the defendant cannot be held to bail, as he is in that action a mere debtor. *Ostell v. Brough*, 24 How. 274. Where a complaint sets forth a state of facts which the court holds does not show such a receipt of money in a fiduciary capacity as will warrant an arrest on that ground only, no arrest can be maintained, although the charge of retaining money received in a fiduciary capacity is joined with a charge of converting the same funds. A conversion of money, and its receipt in a fiduciary capacity, must necessarily be entirely different and inconsistent. In the absence of the fiduciary relation between the parties, the liability to pay such money to the principal becomes a mere debt, which cannot be joined in a complaint with a cause of action for the tort implied in the charge of conversion. *McBurney v. Martin*, 6 Rob. 502. See *Lambert v. Snow*, 9 Abb. 91; S. C., 17 How. 517; 2 Hilt. 501; *Brown v. Ashbough*, 40 How. 226; *Ely v. Steigler*, 9 Abb. N. S. 35.

And where money has been received in a fiduciary capacity, the right to arrest the factor or broker will not be barred by the acceptance by the principal of a note or check which is dishonored at maturity, even if such note or check was given after such cause of action accrued. *Shipman v. Shafer*, 14 Abb. 449; *Pettengill v. Mather*, 12 id. 436; S. C., 16 id. 399; 34 Barb. 522; 22 How. 30; *Bull v. Melliss*, 9 Abb. 58; *Merchants' Bank v. Dwight*, 13 How. 366; *Harding v. Shannon*, 20 id. 25. But see *Alliance Insurance Company v. Cleveland*, 14 id. 408. But where the plaintiff, with knowledge of the facts constituting a fraud, makes a compromise of the matter without suit, or, after an action has been commenced, compromises the action, the compromise will be held valid in law. As a matter of course, no arrest could be maintained in such a case, where the right of action is denied. *Adams v. Sage*, 28 N. Y. (1 Tiff.) 103.

n. Misconduct in office or profession. The remaining cases in which the right to arrest is given by subdivision 2 of section 179 of the Code, are found in actions for misconduct or neglect in office, or in a professional employment. From the provisions of this subdivision, canal commissioners, etc., must be excepted. See 1 R. S. 224, § 43. The non-payment of money collected by an attorney for his client, after it has been demanded from the

Replevin or claim and delivery.

attorney by the client, would furnish a ground for an arrest as misconduct in a professional employment, even if this subdivision of section 179 of the Code did not expressly give authority to arrest a defendant in an action for such breach of professional duty. See *Stage v. Stevens*, 1 Denio, 267.

o. Replevin. The defendant may be arrested in an action to recover the possession of personal property unjustly detained, where the property, or any part thereof, has been concealed, removed or disposed of, so that it cannot be found or taken by the sheriff, and with the intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof. Code, § 179, subd. 3.

The action to recover the possession of personal property was given by the Code in place of the former action of replevin, and its design is to subserve the same purposes. It will be observed that there is a marked difference between the action to recover *damages* for wrongfully taking, detaining or converting personal property, and an action to recover the *possession* of the property itself. And, before commencing an action, the plaintiff should determine under what form of action it is advisable to proceed; and, having made his election, should conform his subsequent proceedings to the remedy he has chosen. Having made his election, he will be required to abide by it. He cannot commence the action and hold the defendant to bail, and also have the property delivered to him before judgment. *Chappel v. Skinner*, 6 How. 338. Neither can an order of arrest for the taking, detention and conversion of personal property be properly granted under subdivision 3. In an action of this nature, the recovery of damages is the sole object of the proceedings, while the remedy provided by subdivision 3 is given only in actions to recover possession of property unjustly detained with damages by reason of such detention. *Seymour v. Van Curen*, 18 How. 94; *Tracy v. Griffin*, 50 Barb. 70; S. C., 35 How. 209.

It will be seen that the remedy given by subdivision 3 applies where the relief sought for the detention of personal property is the recovery of possession; and that the right to arrest depends on the fact that the provisional remedy of replevin or its substitute under the Code, called claim and delivery, has been defeated and rendered inoperative by the act of the defendant, in concealing, removing or disposing of the property, so that the sheriff cannot take it, and with the intent that it should not

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be so found or taken, *or with the intent to deprive the plaintiff of the benefit of it.* *Watson v. McGuire*, 33 How. 87; S. C., 2 Daly, 219; *Mulvey v. Davison*, 8 How. 111; *Purchase v. Belhows*, 23 id. 421; S. C., 14 Abb. 357; *Pike v. Lent*, 4 Sandf. 650. But it is not essential that the action of claim and delivery should be entirely unsuccessful to entitle the plaintiff to the right to arrest the defendant. Where the plaintiff, in an action of replevin, obtains a portion of the property, he does not thereby waive the right to an order of arrest against the defendant for the recovery of the remainder, or for damages for its detention, on the ground that the order of arrest must be applicable to the entire cause of action, and not to a part only. *Tracey v. Veeder*, 35 How. 209; S. C., 50 Barb. 70.

p. Fraud in contracting the debt, etc. Under the provisions of subdivision 4 of section 179 of the Code, a defendant may be arrested if he has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought. The only difficulty in the application of this remedy lies in determining what has been decided to constitute a fraud in contracting a debt or incurring an obligation. In determining this question it is necessary to look behind the transaction itself and scrutinize the intent of the purchaser or obligor. The test inquiry in such cases is, "did the party purchase the goods in question with the intention not to pay for them?" *Hall v. Naylor*, 6 Duer, 71; S. C., 18 N. Y. (4 Smith) 588; *Nichols v. Pinner*, id. 295 to 299. The first important consideration is to determine what evidence is proof of this fraudulent intent.

Usually, the fact that the purchaser sells for less than he pays, almost immediately after he obtains possession of the purchased article, is considered a strong badge of fraud, and almost conclusive evidence that the purchaser intended not to pay the price. But this presumption may be rebutted by proof that the article was sold for full market value. *Manning v. Solis*, 50 Barb. 224. But where a party represents himself as "good and responsible for all the goods he may purchase," and thereby obtains credit, and in a short time afterward, without any change in his circumstances, discloses, in an assignment, an indebtedness double in amount to the value of the property assigned, the presumption of fraud will be conclusive. *Scudder v. Barnes*, 16 How. 534; *Smith v. Frank*, 2 Rob. 626; and see *Wilmerding v. Mooney*, 11 Abb. 283.

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It is evident that the intention of the purchaser may be evidenced by his representations of his solvency or ability to pay for the goods purchased, taken in connection with the facts appearing when default is made in such payment. The proposition is already established that the mere fact that the purchaser knew that he had not sufficient property to pay his debts, or in other words, was insolvent, and did not voluntarily disclose this fact at the time of contracting the liability in question, is not in itself sufficient evidence of fraud to warrant an arrest. The law does not imply an obligation on the part of the purchaser to disclose, unasked, the condition of his finances, in order to escape the imputation of fraud. *Mitchell v. Worden*, 20 Barb. 253; *Hennequin v. Naylor*, 24 N. Y. (10 Smith) 139; *Nichols v. Michael*, 24 id. 264; S. C., 18 id. (4 id.) 300; *McDonald v. Christie*, 42 Barb. 36. But the rule is otherwise, where after a long course of business transactions, calculated to awaken confidence between the parties, a party purchases goods after he is not only insolvent, but has performed an open and notorious act of insolvency by breaking up his business and assigning his property for the benefit of his creditors. In this case it is the duty of the purchaser to disclose the fact of his insolvency, and a failure to do so amounts to a fraud and is a ground for an arrest. *Mitchell v. Worden*, 20 Barb. 253; *Johnson v. Monell*, 2 Keyes, 655; *Chaffee v. Fort*, 2 Lans. 81. This distinction is founded on the rule that fraud is never to be presumed but must be shown affirmatively; and that in the case first mentioned there is nothing inconsistent with an honest intent to pay the debt contracted, although the purchaser knew of his insolvency at the time of incurring the liability. *Nichols v. Pinner*, 18 N. Y. (4 Smith) 295. But, where it clearly appears that the concealment of the fact of insolvency was for the express purpose of procuring goods and not paying for them, the sale will be void and the purchaser liable to arrest. Such purpose may be inferred by the jury from the circumstances and conduct of the purchaser, not only in respect to the sale in question, but also in other cotemporaneous transactions. *Van Kleeck v. Leroy*, 4 Abb. N. S. 431; S. C., 4 Trans. App. 295; *Hennequin v. Naylor*, 24 N. Y. (10 Smith) 139; *Mitchell v. Worden*, 20 Barb. 253; *Morrison v. Garner*, 7 Abb. 425; *Byrd v. Hall*, 2 Keyes, 646; *Johnson v. Monell*, id. 655. But the proof of an intent to defraud should not be equivocal and conflicting. And where the

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evidence relied upon to establish a fraud, is the false representations of the purchaser, it is necessary that the plaintiff should satisfactorily prove that those representations were fraudulently made.

That they are not only false in fact, and caused the loss sustained by him, but beyond this that they were made with the intent to deceive him. *Marsh v. Falker*, 40 N. Y. (1 Hand) 562; *Robinson v. Flint*, 58 Barb. 100; *Chester v. Comstock*, 6 Rob. 1. The representations must be material and such as are well calculated to deceive, and must have been believed by the party giving the credit, and have been the cause of his parting with his goods. *Brown v. Ashbough*, 40 How. 226; *Clark v. Rankin*, 46 Barb. 570; *Smith v. Jones*, 4 Rob. 655. A creditor is not entitled to an order of arrest unless a fraud—a cheat has been practiced upon him. *Ib.*

But where a purchaser makes several representations with intent to deceive, and by this means induces another, relying on the truth of all the representations, to sell him goods on credit, it is sufficient ground of arrest that only one of such representations was false, if it is of such a character as to have materially influenced the giving of credit. *Wannemacher v. Davis*, 2 Sweeny, 272.

A purchaser who obtains credit by false representations, which he knew to be false at the time, will be held to *intend* the legitimate consequences of his acts, and a denial of a fraudulent intent in making such representations will not avail him on a motion to discharge from an arrest therefor. *Whitcomb v. Salsman*, 16 How. 533. The rule, however, would have been different had he made these representations believing them to be true at the time he made them, even though they were utterly false in fact. In such a case no fraud could be intended, and the constructive guilt of a debtor who is in fact innocent is not a sufficient ground for imprisonment. *People v. Kelly*, 35 Barb. 444; S. C., 13 Abb. 405; *Birchell v. Strauss*, 28 Barb. 293; S. C., 8 Abb. 53; *Gaffney v. Burton*, 12 How. 516; *Spies v. Joel*, 1 Duer, 669.

In regard to the question of how far a party may rely upon the representations of another, the courts formerly adopted the rule that it must appear that the injured party not only did rely upon the fraudulent statement, but that he had a right to rely upon it, in the full belief of its truth; and that, if the truth of

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these statements *might* have been tested by ordinary vigilance and attention, it is the party's own folly if he neglect to do so, and he is remediless. 2 Pars. on Cont. 270; *Adams v. Sage*, 28 N. Y. (1 Tiff.) 103; *White v. Seaver*, 25 Barb. 235.

This rule was afterward reversed and the opposite rule adopted, that every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party, and unknown to him, as the basis of a mutual engagement; and that he is under no obligation to investigate and verify statements, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith. *Mead v. Bunn*, 32 N. Y. (5 Tiff.) 275; *Blossom v. Barrett*, 37 id. (10 id.) 434; S. C., 5 Trans. App. 36; *Johnson v. Hathorn*, 3 Keyes, 126; S. C., 2 id. 476.

This rule applies where the party making the representations has actual, positive knowledge of the truth or falsity of them. And the rule may be further stated that actionable fraud may be committed by stating what is known to be false, or by professing a knowledge of the truth of a statement, when such profession is untrue. In either case, falsehood uttered with intent to deceive constitute the essential ingredients. *Chester v. Comstock*, 40 N. Y. (1 Hand) 575, note; *Marsh v. Falker*, id. 562; *Brown v. Ashbough*, 40 How. 226.

It is immaterial whether a fraud committed in contracting a debt would have avoided the sale or not. In either case the purchaser is liable to arrest. And where a defendant purchased goods for cash, and got them into his possession, with an intent to forthwith convert them into property not capable of being readily reached by execution, or to sell them to a *bona fide* purchaser to prevent a stoppage *in transitu*, he committed a fraud in buying the goods, for which he was held liable to arrest.

Wallace v. Murphy, 22 How. 414; *Harding v. Shannon*, 20 id. 25. And where a person borrows money on a promise to apply it to a particular use, but fraudulently applies it to another, he is liable to arrest for fraud in contracting the debt. *Lovell v. Martin*, 11 Abb. 126.

The rule has been laid down that in an action against copartners, upon debts due by the firm, all the partners are liable to arrest under the Code, by reason of the fraud committed in incurring the debt; and this, though the others neither actually participated in the fraud at the time it was committed, or after-

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ward, by adoption. *Anonymous*, 6 Abb. 319, note; *Bull v. Melliss*, 9 id. 58; *Townsend v. Bogart*, 11 id. 355; *Coman v. Allen*, 21 How. 114; *Hawkins v. Appleby*, 2 Sandf. 421; *Sharp v. Mayor of N. Y.*, 40 Barb. 256; S. C., 25 How. 389.

But this has ceased to be the rule of practice in actions of this nature. There is a wide distinction between a liability to respond in damages for the tort of a partner, and a liability to an arrest for such tort. And where the tort is waived, and the action is brought to recover a *debt*, although all the partners are liable in damages for the fraudulent representations of a copartner in incurring such debt, the liability to arrest extends only to such as are *actually* and not constructively guilty of fraud. *National Bank of the Commonwealth v. Temple*, 39 How. 432; S. C., 2 Sweeny, 344; *Hanover Company v. Sheldon*, 9 Abb. 240; *Wetmore v. Earle*, id. 58, note; *Woodruff v. Valentine*, 19 id. 93; *Clafin v. Frank*, 8 id. 412. But a partner may make the fraud of a copartner his own, and render himself liable to arrest, by retaining the property fraudulently acquired. *Hanover Company v. Sheldon*, 9 Abb. 240; *Anonymous*, 6 id. 319; *Hawkins v. Appleby*, 2 Sandf. 421. See *Clafin v. Frank*, 8 Abb. 412.

There must be personal guilt of a party to a debt, in respect to fraud in contracting it, to make him liable to arrest in an action for the debt, within the spirit of section 179, subdivision 4, of the Code. *Clafin v. Frank*, 8 Abb. 412.

The right to arrest a defendant in a civil action for fraudulent representations in the purchase of property is not confined to cases where the purchaser contracted the debt in this country. The right of a foreign creditor to arrest a defendant who has, by means of fraudulent representations, procured credit in a foreign country and brought the property to this State with him, is well established; and the fact that the right to arrest for the same transaction is not given by the laws of the country where the fraud was committed, does not affect the rule. In cases like this, the *lex fori* and not the *lex loci* governs. *City Bank v. Lumley*, 28 How. 397; *Brown v. Ashbough*, 40 id. 226.

q. Fraud in concealing property. A defendant may be arrested when he has been guilty of a fraud in concealing or disposing of the property for the taking, detention or conversion of which the action is brought. Code, § 179, subd. 4.

Damages for fraud or deceit.

r. Damages for fraud or deceit. By the amendment of the Code in 1863, authority was given for the arrest of a defendant in an action brought to recover damages for fraud or deceit. Previous to this amendment, this right was given only in actions against non-residents under the first subdivision of section 179 of the Code. Under subdivision 4 no restrictions as to residence are imposed, and the right to the remedy is given whenever a party has been damaged through the fraud or deceit of another. *Hazlett v. Gill*, 19 Abb. 353; S. C., 4 Rob. 627.

In an action for damages incurred through the fraudulent representations of another, the question of intent must control. Whatever the representations may be, the important and essential point to determine is, whether they were fraudulently made; that they were imprudently or indiscreetly made is not enough. Deceit is the gist of the action. Falsehood, the intent to deceive, and damage must concur to entitle the plaintiff to the right to arrest the defendant in an action for damages for fraud and deceit. *Chester v. Comstock*, 40 N. Y. (1 Hand) 575; *Marsh v. Falker*, id. 562.

It has been said that one who, without knowledge of its truth or falsity, makes a material misrepresentation, is guilty of fraud as much as if he knew it to be false. *Bennett v. Judson*, 21 N. Y. (7 Smith) 238; *Craig v. Ward*, 36 Barb. 377; S. C. affirmed, 3 Keyes, 387; 2 Trans. App. 281; *Sharp v. Mayor of New York*, 40 Barb. 256.

But this rule requires an important modification. Where it is attempted to charge a party with fraud for representations which were false in fact, and concerning the truth or falsity of which the party had no knowledge, it is necessary to prove that such representations were made in a manner calculated to induce the belief that the party had knowledge of the facts he professed to relate, and with the intent that they should be so believed; and that acting on such representations, in the belief that they were true, the plaintiff suffered the damage for which the action is brought. In this case, the fraud consists in the intentional falsehood contained in the pretense to knowledge which the defendant did not have, and the consequent loss on the part of the plaintiff. *Marsh v. Falker*, 40 N. Y. (1 Hand) 562; *Brown v. Ashbough*, 40 How. 226; *Robinson v. Flint*, 58 Barb. 100.

But where damages for fraud or deceit are asked incidentally, and there is one principal cause of action in the complaint

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that will not justify an order of arrest, no arrest can be ordered in the action. *Ely v. Steigler*, 9 Abb. N. S. 35; *McGovern v. Payn*, 32 Barb. 83; *Smith v. Knapp*, 30 N. Y. (3 Tiff.) 688; *Miller v. Scherder*, 2 N. Y. (2 Comst.) 262; *Suydam v. Smith*, 7 Hill, 182; *Brown v. Treat*, 1 id. 225. But if the facts stated in the complaint merely constitute a cause of action for fraud or deceit, an order of arrest may be granted, although the demand for judgment asks for equitable relief, inconsistent with the facts alleged. *Redfield v. Frear*, 9 Abb. N. S. 449.

Actions for damages for fraud and deceit are frequently brought where the alleged fraud consists in representations, made by a vendor concerning the article sold, which representations prove to be false in fact. But one rule applies to all such cases. If the vendor, intending to deceive, misrepresented the character or condition of the article sold, and the vendee, relying on such representations, suffered damage thereby, the vendor is clearly liable in an action for such damages, and may be held to bail. But, if the vendor is ignorant of any unsoundness or other defect in the article sold, a mere representation of soundness will not render him liable, in an action to recover damages for deceit or fraud, upon a subsequent discovery of a defect then secret. *Binnard v. Spring*, 42 Barb. 470; *Clark v. Bamer*, 2 Lans. 67; *Marsh v. Falker*, 40 N. Y. (1 Hand) 562.

s. Removing property with intent to defraud creditors. The fifth subdivision of section 179 of the Code gives the right to arrest a defendant who has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.

The rule that applies to all arrests where fraud is charged in the complaint, applies to arrests under this subdivision of section 179. In all cases in which fraud is charged, proof of an actual intent ought to be required, to justify an order of arrest. The constructive guilt of a debtor who is innocent in fact, should not be a sufficient ground for his imprisonment. *People v. Kelley*, 35 Barb. 444; S. C., 13 Abb. 405; *Birchell v. Strauss*, 28 Barb. 293; S. C., 8 Abb. 53; *Pacific Mutual Insurance Company v. Machado*, 16 id. 451; *Krauth v. Vial*, 10 id. 139; *Spies v. Joel*, 1 Duer, 669. The question of intent is one of fact and not of law, and no rule can be given for determining in all cases what constitutes an "intent to defraud." This must be determined by the facts of each individual case. But in no case can a partner, in an action relating to the partnership effects, and before a

Females for willful injury, etc. — Contempts — Usurpation of office.

balance struck, obtain the arrest of a copartner, for an alleged fraudulent removal of partnership property. *Cary v. Williams*, 1 Duer, 667; *Smith v. Small*, 54 Barb. 223. In order to obtain an execution against the person in cases falling under the fifth subdivision, an arrest of the defendant must necessarily precede a judgment in the action. Code, § 288; *Atocha v. Garcia*, 15 Abb. 303; S. C., 24 How. 186; *Purchase v. Bellows*, 23 id. 421; S. C., 14 Abb. 357; *Lee v. Elias*, 1 Code R. N. S. 116; S. C., 3 Sandf. 736.

t. Females for willful injury, etc. The provisions of the Code relating to arrest are general, and apply to males and females, equally. But by the express terms of the last clause of the fifth subdivision no female can be arrested in any action except for a willful injury to person, character or property. Under the Revised Statutes of 1830, no female could be imprisoned on any process in any civil action founded on contract. 2 R. S. 428 (446), § 9. And by the common law a married woman was exempt from arrest in all cases whatever. *Anonymous*, 1 Duer, 613; S. C., 8 How. 134. The common-law rule is still in force, and the provisions of the Code apply to unmarried females only. *Anonymous*, S. C., id. 134; *Baldwin v. Kimmel*, 1 Rob. 109; S. C., 16 Abb. 353. And where a female is arrested for an injury to property, the injury must be something more than a conversion. It must be a malicious, willful, wanton injury, calculated not only to destroy the plaintiff's property in the property, but also the property itself. *Tracy v. Leland*, 3 Code R. 47; S. C., 2 Sandf. 729; N. Y. Leg. Obs. 234. But see *Starr v. Kent*, 2 Code R. 30; *Northern Railway v. Carpentier*, 13 How. 222; S. C., 3 Abb. 259. And a fraud in contracting a debt or incurring an obligation is obviously not one of the grounds upon which a female may be arrested. *Wheeler v. Hartwell*, 4 Bosw. 684.

u. Contempts. It is provided in section 178 that the provisions of the Code in regard to arrest and bail shall not apply to proceedings for contempts. The practice relating to proceedings of this nature will be fully treated in a subsequent part of this work. The acts which constitute a criminal contempt for which an arrest may be made, are enumerated in the statute. 2 R. S. 273 (288), § 10.

v. Usurpation of office. The Code also provides that in an action brought by the attorney-general against a person for usurping an office, a judge of the supreme court, upon proof by

 Proceedings to obtain an order of arrest.

affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, may grant an order for the arrest of such defendant, and holding him to bail; and that upon such order the defendant may be arrested and held to bail, in the manner and with the same effect and subject to the same rights and liabilities as in other civil actions where the defendant is subject to arrest. Code, § 435.

ARTICLE V.

PROCEEDINGS TO OBTAIN AN ORDER OF ARREST.

Section 1. In general.

a. Mode of proceeding. It is presumed that the plaintiff, before proceeding to obtain an order of arrest, has considered: 1. Whether the form of the action is such that an order can legally issue. 2. Whether the defendant is permanently or temporarily exempt from arrest. 3. Whether, where the right to the remedy is clear, it is advisable to exercise that right and demand the arrest of the defendant.

These preliminaries being disposed of, the next step is to apply for an order. The application may be made to any judge of the court in which the action is brought, or to a county judge, and should be supported by affidavits setting forth facts showing that a sufficient cause of action exists, and that the action is one in which the defendant is arrestable. The application must be accompanied by a written undertaking, securing the payment of the costs of the action, and the damages which the defendant may suffer by reason of the arrest, in case the judgment should be rendered in favor of the defendant instead of the plaintiff. Code, §§ 180, 182. The details of this procedure are given in the following sections:

Section 2. Who may obtain the order.

a. The original party. A plaintiff may obtain an order for the arrest of the defendant for a wrong committed, where he can show himself clearly entitled to maintain an action for the redress of the wrong. But, beyond this, no arrest can be maintained, and no order should be granted. And where the plaintiff has suffered a wrong in the performance of an illegal act he cannot obtain an order of arrest. *Rolfe v. Delmar*, 7 Rob. 80. It must appear that a sufficient cause of action *exists*, and this can-

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not appear before the right of action accrues, or after it is barred by lapse of time. *Arthurston v. Dalley*, 20 How. 311; *Wheel-right v. Joseph*, 5 Maule & Selw. 93. See art. 2, § 1, of this chapter, *ante*, 589.

b. Assigned demands. The assignee of an assignable demand has all the rights to any remedy in an action that the assignor would have been entitled to if the action had been between the original parties, and this includes an order of arrest. *King v. Kirby*, 28 Barb. 49; *Grocers' National Bank v. Clark*, 48 id. 26; S. C., 32 How. 160. But this rule can apply only to such demands as are capable of assignment. As a general rule, mere personal torts which die with the person, such as slander, assault and battery, false imprisonment, crim. con., seduction and the like are not assignable; but torts for taking and converting personal property, or for an injury to personal property, and, in general, all such rights of action for a tort as would survive to the personal representatives of the injured party, may be assigned. *Butler v. New York & Erie Railroad Co.*, 22 Barb. 110; *McKee v. Judd*, 12 N. Y. (2 Kern.) 622. The power to assign and to transmit to personal representatives are convertible propositions. *Zabriskie v. Smith*, 11 N. Y. (1 Kern.) 480. Among the assignable demands thus generally mentioned may be placed a cause of action against a common carrier for loss of the goods, or for negligence in delivering them. *Smith v. New York & New Haven Railroad Co.*, 28 Barb. 605; S. C., 16 How. 277; *Freeman v. Newton*, 3 E. D. Smith, 246; *Waldron v. Wil-lard*, 17 N. Y. (3 Smith) 466. A cause of action against an agent for the conversion of funds. *Gould v. Gould*, 36 Barb. 270; S. C., 41 id. 654. A right of action against the vendor of land for fraudulent representations as to an incumbrance. *Haight v. Hayt*, 19 N. Y. (5 Smith) 464. An action to recover back money paid in consequence of the false and fraudulent representations of the defendant. *Byxhie v. Wood*, 24 N. Y. (10 Smith) 607; S. C., 2 Bosw. 267. A claim for damages to personal property. *Butler v. New York & Erie Railroad Co.*, 22 Barb. 110. A claim for damages for the conversion of property by an officer or agent of a bank. *Grocers' National Bank v. Clark*, 32 How. 160; S. C., 48 Barb. 26. And a cause of action for the conversion of personal property generally. *Genet v. Howland*, 30 How. 380; S. C., 45 Barb. 560; *Robinson v. Weeks*, 6 How. 161; S. C., 1 Code R. N. S. 311; *McGinn v. Worden*, 3

Against whom an order may be obtained.

E. D. Smith, 355 ; *Whittaker v. Merrill*, 30 Barb. 389. The power to make an assignment of rights of action is not confined to natural persons, but extends equally to artificial persons. *Grocers' National Bank v. Clark*, 32 How. 160 ; S. C., 48 Barb. 26. In all the cases mentioned the defendant may be arrested in an action brought by the assignee.

Section 3. Against whom an order may be obtained.

a. Every person liable to arrest. As a general rule, all persons in this State are liable to arrest, and any exception, in the form of an exemption of a temporary or of a permanent nature, arises from considerations of public policy and interest, and not of social position. The persons exempt under the various statutes and decisions have been specifically mentioned and classified in a previous article. *Ante*, 589 to 605. But the fact that a person is temporarily exempt from arrest will not afford a valid reason why an order of arrest should not issue against him, for, even where a defendant has been arrested while temporarily exempt, the order of arrest will not be vacated, although the defendant be discharged out of custody. A re-arrest on the same order may be had when the right to exemption ceases. *Hart v. Kennedy*, 15 Abb. 290 ; S. C., 14 id. 432 ; 23 How. 417 ; 39 Barb. 186 ; 24 How. 425 ; *Petrie v. Fitzgerald*, 1 Daly, 401.

b. Infants, married women, lunatics, etc. Infancy is not a bar to an arrest, and an order of arrest may be obtained against an infant as well as against an adult. Under the former practice infants could only be proceeded against by *capias*. The process was in the ordinary form, no notice being taken of infancy. *People ex rel. Bailey v. Hoffman*, 7 Wend. 489. An order of arrest against a married woman will be vacated on proof of coverture. The common-law rule in this respect is unchanged. *Anonymous*, 1 Duer, 613 ; S. C., 8 How. 134 ; *Baldwin v. Kimmel*, 1 Rob. 109 ; S. C., 16 Abb. 353. A lunatic may be arrested on civil process, and can only be discharged from imprisonment on an order from a county judge directing him to be removed to the State lunatic asylum. *Bush v. Pettibone*, 4 N. Y. (4 Comst.) 300 ; S. C., 1 Code R. N. S. 264 ; Laws of 1842, ch. 135.

c. Officers, agents, etc. An order of arrest may be obtained against the officers or agents of a corporation for misconduct in the performance of their duties as such. This rule also applies to cases where the act for which an arrest is sought consists in a misapplication or embezzlement of the property of the corpora-

Who may grant the order.

tion. *Crook v. Jewett*, 12 How. 19; and to public officers in like cases; and it also extends to officers of foreign governments, when the action is brought in this State by the legalized officer of such government. *Peel v. Elliott*, 16 How. 481; *Republic of Mexico v. De Arrangoiz*, 5 Duer, 634, 643.

Section 4. Who may grant the order.

a. Judge of the court. An order for the arrest of a defendant must be obtained from a judge of the court in which the action is brought, or from a county judge. Code, § 180. But the power of a judge of the court to grant an order of arrest is limited as to time. The order can be granted to accompany the summons, or at any time afterward *before judgment*. Code, § 183. See § 7, *a, post*, 649. In an action brought by the attorney-general against a defendant for usurping an office and receiving the fees or emoluments of the same, the order can be granted only by a judge of the supreme court. Code, § 435.

b. County judge. The Code in section 180 authorizes a county judge to grant an order of arrest. But this does not authorize a judge of any county to grant such an order irrespective of the place of trial or residence of the parties or their attorneys. When an order of arrest is granted by a county judge, such judge must be a judge of the county where the action is triable, or of the county in which the attorney for the moving party resides. Code, § 401. As to the county in which an action is triable, see *ante*, 181 to 190, and §§ 124, 125 of the Code; *Gould v. Chapin*, 4 How. 185; S. C., 2 Code R. 107; *Bangs v. Selden*, 13 How. 163.

A local officer, elected to discharge the duty of surrogate in a county where there is an acting county judge and surrogate, may grant an order of arrest without regard to the questions whether the office of county judge was vacant, or whether the judge was unable to act. *Seymour v. Mercer*, 13 How. 564, 566, note. And no appeal will lie to the special term of the supreme court from an order so granted, as the officer acts as a justice of a supreme court at chambers, and his orders are to be reviewed in like manner. *Conklin v. Dutcher*, 5 How. 386; S. C., 1 Code R. N. S. 49; Code, § 403; Laws of 1851, ch. 108, § 1.

As to the disqualification of a judge to grant an order of arrest by reason of relationship, see *New York and New Haven Railroad Company v. Schuyler*, 28 How. 187; *ante*, 46, 47.

Affidavit on which to grant order.

Section 5. Affidavit on which to grant order.

a. By whom made The affidavit upon which the application is based may be made by the plaintiff, or by any other person who has sufficient knowledge of the requisite facts to convince the judge that an order should issue. Code, § 181.

b. What is an affidavit? An affidavit is a written statement or declaration of facts sworn or affirmed to before some officer who has authority to administer an oath.

An affidavit is always taken *ex parte*, and herein it differs from a deposition, as in the latter an opportunity is always given to the adverse party to cross-examine the deponent. An affidavit should be so framed as to intelligibly refer to the cause in which it is made; and this can most readily be done by inserting the title of the cause. It should state the place where it was taken, to show that the officer before whom it was taken had jurisdiction; it should be signed at the end by the affiant, and the jurat should be signed by the officer with the addition of his official title. When taken before certain specified officers, the statute requires that the affidavit should also bear the seal of such officers. See *Officers of Courts, ante*, 255; *Affidavit, post*, 641 to 645.

c. Contents in particular cases. General rules may be given in regard to the formal requisites of an affidavit, but it is evident that none can be given that will determine what facts must necessarily be set forth to meet the requirements of each particular case in which an affidavit may be employed. The affidavit used in support of an application for an order of arrest must show by statements, clearly and certainly expressed, that a sufficient cause of action exists, and that the case is one of those mentioned in section 179 of the Code. Code, § 181; *Crandall v. Bryan*, 15 How. 48; S. C., 5 Abb. 162; *Pindar v. Black*, 4 How. 95; S. C., 2 Code R. 53.

d. Mode of stating facts. The object of requiring an affidavit in support of an application for an order of arrest is to enable the judge to determine whether a sufficient cause of action exists, and whether the case is one of those mentioned in section 179 of the Code. The opinion of the person making the affidavit is of no importance; and where the affidavit recites mere conclusions of law, or contains a mere repetition of the bare words of the statute, it will be insufficient. *Pindar v. Black*, 4 How. 95; S. C., 2 Code R. 53; *Crandall v. Bryan*, 15 How. 48; S. C., 5 Abb.

Mode of stating facts in affidavit.

162. The facts or the sources of the information must be set forth upon which the belief of the deponent is founded, so that the court may be able to ascertain whether the party is right in entertaining the belief to which he deposes. So far as the facts may be within the knowledge of the plaintiff, they must be stated positively, but so far as they necessarily rest on information derived from others, they may be so stated, where the source and nature of the information are particularly set out, and a good reason is given why a positive statement of them cannot be procured. *Whitlock v. Roth*, 5 How. 143; S. C., 10 Barb. 78; 9 N. Y. Leg. Obs. 95; 3 Code R. 142; *De Nierth v. Sidner*, 25 How. 419; S. C., 16 Abb. 295; *Vanderpool v. Kissam*, 4 Sandf. 715; *Blason v. Bruno*, 21 How. 112; S. C., 33 Barb. 520; 12 Abb. 265; *City Bank v. Lumley*, 28 How. 397; *Cook v. Roach*, 21 id. 152. If the information is derived from letters or official documents in the possession of the person who makes the affidavit, or which it is in his power to procure, they should be presented with the application, or copies of them should be furnished, and where such papers or copies cannot be furnished, a satisfactory excuse for their absence should be given in the affidavit. *De Nierth v. Sidner*, 25 How. 419; S. C., 16 Abb. 295; *City Bank v. Lumley*, 28 How. 397. And where an affidavit is founded on information and belief, it should set forth good reasons why the person from whom the information is derived did not make the affidavit. *Bell v. Mali*, 11 How. 254. Unless some excuse is given, the rule of evidence applies, that a party shall not be allowed to resort to inferior evidence, when he has it in his power to produce evidence affording greater certainty as to the fact in question.

No arrest can be allowed on an affidavit based solely on information, and unexplained by allegations of facts showing the sources from which the information is drawn, or the reasons why the best evidence is not given. *Moore v. Calvert*, 9 How. 474; *Union Bank v. Mott*, 6 Abb. 815; *Cook v. Roach*, 21 How. 152; *De Neirth v. Sidner*, 25 id. 419; S. C., 16 Abb. 295, sub nom. *De Weerth v. Feldner*; *Satow v. Reisenberger*, 25 How. 164. The plaintiff cannot be too particular in the manner of the statement of the facts upon which he relies as evidence of his right to an order of arrest. These facts should be presented, where possible, with the same clearness, fullness and detail as they would be if relied on to recover at the trial of the cause, although an order may be granted on evidence that would be

Mode of stating facts in affidavit.

insufficient to warrant a final recovery. But, in all cases, a *prima facie* case must be made out before an order of arrest can properly issue. *Sachs v. Bertrand*, 22 How. 95; S. C., 12 Abb. 433; *Crandall v. Bryan*, 5 id. 162; S. C., 15 How. 48; *Whitlock v. Roth*, 5 id. 143; S. C., 10 Barb. 78; 9 N. Y. Leg. Obs. 95; 3 Code R. 142; *Adams v. Mills*, 3 How. 219.

Facts stated generally, as that the cause of the action is one of those mentioned in section 179 of the Code, will be clearly insufficient. *Pindar v. Black*, 4 How. 95; S. C., 2 Code R. 53. The affidavits to authorize an order of arrest for fraudulent representations, whereby the defendant procured the sale and delivery of personal property, must not only set forth the particular statements or representations made in order to obtain the property, but must also set forth in what respects they are false. *Draper v. Beers*, 17 Abb. 163.

For the form and contents of an affidavit to procure an order of arrest under subdivision 4 of section 179 of the Code, see *Smith v. Jones*, 4 Rob. 655.

And, in an action for a malicious prosecution, the facts which are relied on as *prima facie* evidence of a want of probable cause must be set forth in the affidavit, so as to enable the judge to whom the application for an order of arrest is made, to draw the proper conclusions of law. *Vanderpool v. Kissam*, 4 Sandf. 715. See *Gould v. Sherman*, 10 Abb. 411. So, where the affidavit states generally that the defendant has removed or disposed of his property, with intent to defraud his creditors, facts and circumstances to warrant such a conclusion must be stated. *Frost v. Willard*, 9 Barb. 440; *Courter v. McNamara*, 9 How. 256. See *Furman v. Walter*, 13 id. 348. Setting forth in an affidavit that the defendant had charged the plaintiff with theft, without alleging that such charge was false, will not justify the issuing of an order of arrest, as the affidavit does not show a cause of action. *Adams v. Mills*, 3 How. 219. And as to the practice before the Code, see *Ex parte Robinson*, 21 Wend. 672; *Smith v. Luce*, 14 id. 237.

In ordinary practice, a plaintiff desiring the arrest of a defendant should base his application for the order upon affidavits setting forth facts showing a right of arrest under some one of the subdivisions of section 179 of the Code. He should frame his complaint in accordance with the strict rules of pleading, and should carefully avoid the insertion of any allegation not

Mode of stating facts in affidavit.

necessary to constitute a right of action, even though it might be pertinent to show the right of arrest. The application may then be made on the affidavits alone, or it may be made on a verified complaint and affidavits combined. The complaint will, in such cases, and for the purposes of the motion, be regarded as an affidavit, and if it supplies any omission in the affidavits with which it is used, the order may be issued, although it could not have been properly granted on the affidavits alone. In this case the order will be deemed to have been granted on all the moving papers. *Brady v. Bissell*, 1 Abb. 76; *Turner v. Thompson*, 2 id. 444.

In all cases where the right of action and the right of arrest are identical, and where a brief and concise statement of the facts constituting the cause of action, as set forth in the complaint, discloses also such grounds for arrest as will authorize an execution against the body, under section 288 of the Code, even if no order of arrest is obtained before judgment, the complaint alone, if properly verified, will furnish sufficient proof of such necessary facts as will authorize the granting of the order, and no further affidavit will be required in support of the application. The reason of this construction of the rule is obvious. The Code merely provides that the order may be made where it shall appear to the judge, by the affidavit of the plaintiff or of any other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section 179. Code, § 181. A verified complaint is such an affidavit. *Fowler v. Burns*, 7 Bosw. 637; *Hecker v. Mayor of New York*, 28 How. 211; S. C., 18 Abb. 369. Additional affidavits would in effect be only a repetition of what had already been stated in the complaint, as it is necessary, on an application for the order, in cases where the cause of action and cause of arrest are identical, to state in the moving papers every fact necessary to entitle the plaintiff to recover. *Smith v. Jones*, 4 Rob. 655. A still more valid reason for holding a verified complaint as a sufficient affidavit, upon which to base an order of arrest in the case above specified, is furnished by section 72 of the Code, which provides that no execution shall issue against the person of a judgment debtor, unless an order of arrest has been served, as in this act provided, or *unless the complaint contains a statement of facts showing one or more of the causes of arrest required by section 179*. The meaning of the clause thus italicised is, that when the complaint states facts

Mode of stating facts in affidavit.

such as constitute a cause of action for which a party may be arrested, and the facts so stated are legitimately and properly in the complaint, and are necessary and indispensable to constitute the cause of action, an execution may issue against the person, although no order of arrest has been issued or served before judgment. *Elwood v. Gardner*, 10 Abb. N. S. 238; *Wood v. Henry*, 40 N. Y. (1 Hand) 124; *Lembke's Case*, 11 Abb. N. S. 272. It is evident that, if a complaint is sufficient proof of the facts justifying an arrest to authorize an execution against the person after judgment, it is also sufficient to authorize the issuing of an order of arrest before judgment, and while the defendant has ample means of contesting its validity. But it follows from the language of the cases last cited that no allegations in a complaint of facts showing a right of arrest will be of any avail upon an application for the order, unless such facts are also essential as constituting the right of action; and that a complaint can be used on an application for an order of arrest only when the cause of action and cause of arrest are identical.

A careful practitioner will, in all cases, prefer to state the facts in an affidavit, even where a complaint would seem clearly sufficient, and will be so particular in the preparation of the moving papers that the right of arrest shall clearly appear upon their face.

But where the affidavits are themselves sufficient, and they disclose a ground of arrest which is consistent with the allegations of the complaint, the arrest will be maintained, although the case made by the complaint varies from the affidavits. *Stelle v. Palmer*, 7 Abb. 181.

As a general rule, facts should be stated, and not conclusions of law, and yet, in an action brought by a married woman in relation to her separate property, an affidavit upon which an order of arrest is sought will not be insufficient because it alleges in general terms that the property in question was her separate and individual property, without showing how it became so. *Lippmann v. Petersburg*, 10 Abb. 254.

The name of the person against whom an order of arrest is sought should be correctly stated in the affidavit, yet, where the name of the defendant is unknown, he may be designated by any name until the true one is discovered. *Pindar v. Black*, 4 How. 95; S. C., 2 Code R. 53; Code, § 175.

Technically speaking, an affidavit should not be entitled in a

Affidavit of injury to the person — Money received in a fiduciary capacity.

cause before the action is commenced, but, for convenience, in referring to the cause and connecting the application with the subsequent proceedings in the action, the strict rule of practice is frequently disregarded and the title of the action given in the affidavit. A formal error of this nature will, as a rule, be disregarded by the court. *Pindar v. Black*, 4 How. 95; S. C., 2 Code R. 53; *City Bank v. Lumley*, 28 How. 397; Code, § 176.

Affidavit of Injury to the person.

(Title of cause.)
(Venue.)

A. B., the plaintiff above named, being duly sworn, says:

I. That he has a good cause of action against Y. Z., the defendant therein, arising upon the following facts, viz. : * That on the day of last, at the town of in said county, said Y. Z., the defendant, did, without any cause or provocation, violently assault and beat this deponent, by (*state the manner of the assault*) whereby deponent was much bruised and injured; and has since been seriously ill by reason thereof, to the damage of this deponent in the sum of dollars.

II. And this deponent further says, that the said Y. Z. is not a resident of this State, but resides in another State, to wit, in the city of in the State of ; and that said defendant is about to return to the said city and State, as this deponent is informed and verily believes (*or if the defendant is a resident*). That said defendant is about to remove permanently from this State; that he has disposed of his property in this State; has closed up his business and has taken passage for himself and family on board the Steamer Northern Light for California, as this deponent is informed by W. Z., brother of said defendant, and verily believes.

III. And this deponent further says, that he has commenced (*or is about to commence, by the summons hereto annexed*) an action in the supreme court against the said Y. Z., upon the cause of action above stated.

(Jurat.)

(Signature.)

Affidavit of Money received in a Fiduciary Capacity.

(Title of cause.)
(Venue.)

A. B., plaintiff in the above-entitled action, being duly sworn, says, that he has a good cause of action against Y. Z., the defendant therein, arising upon the following facts, viz. : * That on the day of , 18 , this deponent delivered to the said Y. Z., a note broker, doing business in the city of , a certain promissory note for dollars, made by , and

Affidavit of money collected by agent — Of injury to property.

payable to the order of the deponent. That the said note was delivered to the said Y. Z. in trust, to sell the same for cash, as a broker aforesaid, and to return the proceeds thereof immediately to this deponent, and for no other purpose whatever. That said Y. Z. informed this deponent on the same day, that he had sold said note for dollars cash. That said Y. Z. has neglected and refused to pay said sum of dollars or any part thereof to this deponent, although requested to do so, to the damage of this deponent in the sum of dollars. That deponent has commenced (*or is about to commence*, by the summons hereunto annexed) an action in this court against said Y. Z. upon the cause of the action above stated.

(*Jurat.*)

(*Signature.*)

Affidavit of Money Collected by Agent.

(*Title of cause.*)

(*Venue.*)

A. B., plaintiff in the above-entitled action, being duly sworn, says:

I. That he has a good cause of action against Y. Z., the defendant therein, arising upon the following facts, viz.:* That on the day of , 18 , this deponent employed said Y. Z., the defendant herein, as his agent, to collect a certain debt due this deponent from of , in said county; that said Y. Z. was to collect the same in the name of and for the benefit of this deponent, and was to return the proceeds thereof to him immediately upon collecting the same. That said Y. Z. has collected the whole of said debt from the said , and received the money thereon, as will more fully appear by the affidavit of hereto annexed. That this deponent did, on the day of , 18 , demand of said Y. Z. that he account to him for the money so received, and pay the same over to him; but hitherto the defendant has wholly neglected and refused so to do.

II. That this deponent has commenced (*or is about to commence*, by the summons hereto annexed) an action in this court against the said Y. Z. upon the cause of action above stated.

(*Jurat.*)

(*Signature.*)

Affidavit of Injury to Property.

(*As in preceding forms, to the statement of the cause of action*). * That the said Y. Z., on or about the day of , 18 , wrongfully and willfully took from the possession of this deponent the following goods, viz.: (*describe them*) of the value of dollars. That this deponent did, on the day of , last, demand of the said Y. Z. a return of said property, but

Affidavit in an action to recover possession of personal property.

that he refused to return the same, and that he has converted said goods to his own use, to the damage of this deponent in the sum of .

II. That this deponent has commenced, etc. (*as in preceding forms.*)

Affidavit in an Action to recover possession of Personal Property.

(*As in preceding forms, to the statement of the cause of action.*)* That on the day of , 18 , this deponent was lawfully possessed of certain goods and chattels, then and ever since the property of this deponent, consisting of (*describe the property*), of the value of dollars. That on the day of , at , in said county, Y. Z., the defendant above named, (*wrongfully*) took the said property from the possession of this deponent and still wrongfully detains the same, to the damage of this deponent in the sum of dollars.

II. Deponent further says, that he has commenced an action against said defendant, in the supreme court, to recover the possession of said property.

III. That on the day of last, the annexed summons was issued herein, to the sheriff of the county of for service; and the annexed affidavit with the requisition indorsed thereon, together with the prescribed undertaking, were delivered to him for the purpose of obtaining an immediate delivery of such property pursuant to the provisions of the Code of Procedure. That since the commencement of said action (*specify the time as nearly as practicable*) said property was removed (*or concealed, or disposed of*) by the said defendant so that it cannot be found or taken by the sheriff, as more clearly appears by his return hereto annexed.

IV. That, as this deponent believes, said property was so removed (*or concealed, or disposed of*) by the said defendant, with the intent that it should not be so found or taken (*or with the intent to deprive this plaintiff of the benefits thereof*); that the grounds for this belief are as follows: (*state facts and circumstances showing the alleged intent.*)

(*Jurat.*)

(*Signature.*)

Sheriff's return Referred to, as Annexed in the Preceding Form

(*Title of cause.*)

(*Venue.*)

I hereby return that the within-mentioned property has been removed (*or concealed, or disposed of*), so that it cannot be found or taken by me.

(*Date.*)

M. N.,
Sheriff of County.

Affidavit of fraud in contracting a debt.

Affidavit of Fraud in Contracting a Debt.

(Title of cause.)

(Venue.)

A. B., the above-named plaintiff, being duly sworn, says :

I. That he has commenced an action against the above-named Y. Z. in the supreme court, to recover a debt due this deponent, from the said Y. Z., to the amount of dollars, for the following goods sold and delivered by this deponent to the said Y. Z. (*describe goods*).

II. That the said Y. Z. was guilty of a fraud in contracting the said debt.

III. That the said debt was contracted as follows : That on or about the day of last, the said Y. Z. requested this deponent to sell him the above-described goods on credit ; that, for the purpose of inducing this deponent to sell such goods on credit, the said Y. Z. then and there falsely and fraudulently stated and represented to this deponent that he, the said Y. Z. (*set forth the exact representations*). That this deponent believed such statements to be true, and was thereby induced to sell and deliver, and did sell and deliver, to the said Y. Z., upon credit, the said goods, as requested by him, and that, except for such statements and representations, this deponent would not have made such sale and delivery as aforesaid.

IV. And this deponent further alleges, that all such statements and representations were false and untrue, when so made, to the knowledge of the said Y. Z., and that the said Y. Z. made the same with intent to defraud this deponent by obtaining said goods upon credit, with intent not to pay for them. (*Specify every fact and circumstance known to the deponent which will tend to show that the representations of the vendee were false and fraudulent to the knowledge of the said vendee, and were made for the purpose of obtaining the goods with intent not to pay for the same.*)

(*Jurat*

(*Signature.*)

Affidavit of Fraudulent Disposition of Property.

(*As in preceding forms, to statement of cause of action.*)*
That on the day of , 18 , Y. Z., the defendant, made and delivered to this deponent his certain promissory note in writing, of which the annexed is a copy.

II. That at the time of making such note, and for some time prior thereto, said Y. Z. was carrying on business in in said county, as :

III. That on the day said note became due, to wit, on the day of , 18 , this deponent called at the store of the said Y. Z., in , and presented said note to him and demanded payment thereof. That defendant declined to pay the said note

Waiver of defects—Filing of affidavits.

at that time, but requested deponent to call again in three days, to wit, on the day of , and get his money.

IV. That on the day last mentioned, deponent again called as requested and found one M. N. in possession of said store, who then stated to this deponent that, on the preceding day, the said Y. Z. had sold the store and all the goods therein to the said M. N., for which the said M. N. had paid to the said defendant the sum of dollars; and the said M. N. exhibited to deponent the bill of sale thereof executed by the defendant.

V. That said Y. Z. was not present at the said store, and as this deponent is informed and believes, has not been present thereat since the day of sale, and that deponent has made diligent search for the said Y. Z., at his recent abode in , and elsewhere, but is unable to find him or to learn of his whereabouts.

VI. That the said Y. Z. has no other property in this State to the knowledge of this deponent, and that, as this deponent believes, the said Y. Z. has so disposed of his property with intent to defraud his creditors.

VII. That this deponent has commenced, etc. (as in preceding forms).

(*Jurat.*)

(*Signature.*)

e. Waiver of defects. It was formerly a rule of practice that all defects in the affidavit upon which an order of arrest was based were waived by the giving of bail. *Stewart v. Howard*, 15 Barb. 27; *Dale v. Radcliffe*, 25 id. 333; S. C., 15 How. 71; *Barber v. Hubbard*, 3 Code R. 169; Code of 1849, § 204; *Gaffney v. Burton*, 12 How. 516.

This rule no longer exists, and since the amendment of section 204 of the Code in 1858, a motion to vacate an order of arrest may be made after the defendant has perfected bail, and at any time before judgment. *Knickerbocker Life Insurance Co. v. Ecclesine*, 6 Abb. N. S. 9; *Wicker v. Harmon*, 21 How. 462; S. C., 12 Abb. 476, sub nom. *Wickes v. Harmon*. It should be noticed that there is a wide distinction between a waiver of an irregularity arising from an arrest of a party temporarily privileged, and a waiver of a jurisdictional defect in the order itself. In the first instance the exemption is a mere personal privilege, of which the party may or may not avail himself at his option, and an omission to assert this privilege while the exemption exists will be held a waiver of the right.

f. Filing of affidavits. It is the duty of the sheriff to file with the clerk the original affidavits on which an arrest is made,

Security by plaintiff—Who to be sureties.

within ten days after the arrest. Rule 6, Supreme Court. See also Rule 8, id.

Section 6. Security by plaintiff.

a. Form of security. Before an order of arrest can issue, the plaintiff is required to give a written undertaking, with or without sureties, to the effect that, if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least \$100. If the undertaking be executed by the plaintiff without sureties, he must annex to the undertaking an affidavit that he is a resident and householder or freeholder within the State, and worth double the sum specified in the undertaking, over all his debts and liabilities. Code, § 182. This security must be given before the court can acquire jurisdiction to issue the order of arrest. Without it an order would be void. *Newell v. Doran*, 21 How. 427. See Rule 5, Supreme Court.

b. Who to be sureties. It is a matter within the discretion of the court, whether sureties shall be required on the undertaking given by the plaintiff or not, and also to determine as to the sufficiency of the security. If an undertaking executed by one surety is deemed sufficient by the court, no more can be required. The only restriction upon the discretion of the court is, that if security be required at all, it shall be in the form of a written undertaking signed by one or more sureties. *Courter v. McNamara*, 9 How. 255; *Ward v. Whitney*, 8 N. Y. (4 Seld.) 442. It is not even essential that the plaintiff or his agent should sign the undertaking, where other sureties are required; and the former rule to the contrary is abrogated. *Askins v. Hearn*, 3 Abb. 184; *Bellinger v. Gardner*, 2 id. 441; S. C., 12 How. 381; *Courter v. McNamara*, 9 id. 255; *Leffingwell v. Chave*, 19 id. 54. And where a foreign government is plaintiff, the undertaking may be signed by the accredited minister with such other sureties as the court may require. *Republic of Mexico v. Arrangoiz*, 5 Duer, 634; S. C., 11 How. 1; 3 Abb. 470. The undertaking may be executed by any person who can prove to the satisfaction of the court, by affidavit or otherwise, that he possesses the requisite property qualifications. To this rule there is but one exception. In no case can an attorney be surety on any undertaking. Rule 8, Supreme Court.

Undertaking on obtaining order of arrest.

c. Acknowledgment. Whenever a justice or other officer approves of the security to be given in any case, or reports upon its sufficiency, it shall be his duty to require personal sureties to justify, or, if the security offered is by way of mortgage on real estate, the required proof of the value of such real estate. All bonds and undertakings, and other securities in writing shall be duly proved, or acknowledged, in like manner as deeds of real estate, before the same shall be received or filed. Rule 9, Supreme Court. The affidavit of jurisdiction should be annexed to the undertaking and filed with it. *Van Wezel v. Van Wezel*, 3 Paige, 38.

d. Approval. The approval of the judge or justice must in all cases be indorsed on the undertaking, and where the undertaking is not so indorsed, the order may, on motion, be vacated with costs. *Newall v. Doran*, 21 How. 427.

Undertaking on Obtaining Order of Arrest.

(Title of cause.)

WHEREAS, The plaintiff in the above-entitled action has made, or is about to make, application for an order to arrest the defendant therein.

Now, therefore, we, A. B., of , county of , by occupation , and C. D., of , county of , by occupation , and G. H., of , county of , by occupation , do hereby undertake that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum of dollars.

(Signatures.)

Acknowledgment.

STATE OF NEW YORK, }
County of , ss:

On the day of , in the year one thousand eight hundred and seventy , before me personally came A. B., C. D. and G. H., above named, to me known to be the individuals described in, and who executed the above undertaking, and severally acknowledged that they executed the same.

(Signature.)

Justification.

STATE OF NEW YORK, }
County of , ss:

A. B., C. D. and G. H., being severally duly sworn, say, each for himself, that he is a resident and holder within this

Separate affidavits — Indorsement of judge's approval — Service — Filing.

State, and worth the sum of dollars, over all his debts and liabilities, exclusive of property exempt from execution.

Subscribed and sworn to before me this day of ,
187 .

(*Jurat.*)

(*Signatures.*)

Justification — Separate Affidavits.

STATE OF NEW YORK, }
County of . } ss:

A. B., being duly sworn, says, that he is a resident and holder within this State, and worth the sum of dollars over all his debts and liabilities, exclusive of property exempt from execution.

Subscribed and sworn to before me this day of ,
187 .

(*Jurat.*)

(*Signatures.*)

Indorsement of Judge's Approval.

I approve of the foregoing (or within) undertaking and of the sufficiency of the surety therein.

(*Date.*)

(*Signature.*)

e. Service. It is not necessary to serve the original, or a copy of the undertaking, on the defendant. A copy of the affidavit on which the order of arrest was granted, and a copy of the order of arrest are the only papers served on the defendant at the time of the arrest.

f. Filing. But it is the duty of the plaintiff's attorney to file forthwith, with the clerk of the court, all undertakings given upon procuring the order of arrest, with the approval of the judge or justice taking the same indorsed thereon. "A failure to perform this duty gives to the defendant a right to move the court to vacate the proceedings, with costs, as if no undertaking had been given. Rule 5, Supreme Court; *Newell v. Doran*, 21 How. 427.

g. Amendment. But when it appears that through inadvertence the attorney has omitted to file the undertaking with the clerk, the court may relieve the plaintiff with or without terms. *Leffingwell v. Chave*, 19 How. 55; S. C., 10 Abb. 472; 5 Bosw. 703; *Brush v. Wielursky*, 36 How. 253; *Rice v. Whitlock*, 15 Abb. 419.

And where there has been an omission to acknowledge the undertaking as required by rule 9, the proceedings may be

Order of arrest.

amended in this respect and the undertaking acknowledged *nunc pro tunc*. *Conklin v. Dutcher*, 5 How. 386 ; S. C., 1 Code R. N. S. 49. And it is competent for the court to amend an undertaking defective in any other respect. *Bellinger v. Gardiner*, 12 How. 381 ; S. C., 2 Abb. 441 ; *Beach v. Southworth*, 6 Barb. 173 ; 1 Code R. 99.

Section 7. Order of arrest.

a. When to be granted. The order of arrest may be made to accompany the summons, or at any time afterward, before judgment. Code, § 183. It is not essential that the summons should be served before the order of arrest is granted, but it should in all cases be prepared and ready for delivery to the sheriff. *Dunaher v. Meyer*, 1 Code R. 87. See *Gould v. Bryan*, 3 Bosw. 626 ; *Woodward v. Stearns*, 10 Abb. N. S. 395. It is the custom of some courts to demand an inspection of the summons previous to the issuing of the order, or at least, to require proof that a summons has been prepared. This is the practice in the superior court of New York.

The Code requires that the order shall issue before judgment. The word "judgment," as here used, must be construed in accordance with section 245 of the Code, as "a final determination of the rights of the parties in the action." A judgment obtained by default is a final determination of the rights of the parties, within the meaning of this section, until modified by a subsequent order. But where a judgment so obtained is modified by a subsequent order which allows the defendant to answer and litigate the claim set up in the complaint, and at the same time directs that the judgment stand as security for the alleged indebtedness of the defendant to the plaintiff, the judgment, as modified, loses its force as a judgment, standing only as a lien or security, and is not a legal obstacle in the way of a valid order of arrest. *Mott v. Union Bank of the City of New York*, 38 N. Y. (11 Tiff.) 18 ; S. C., 35 How. 332 ; 4 Abb. N. S. 270 ; 4 Trans. App. 291 ; affirming 8 Bosw. 591.

So an order of arrest may be granted after verdict, and before judgment, although the defendant has obtained an order staying proceedings for the purpose of making a case. The order staying the proceedings applies only to the ordinary proceedings in the action and does not affect the plaintiff's right to obtain any temporary relief to which he might be entitled. *Lapeous v. Hart*, 9 How. 541 ; *Thompson v. Erie Railway Co.*, 9 Abb. N. S. 230.

Form and contents of order of arrest.

But in no case can an order of arrest issue after a final judgment in the action ; as the necessity for the order ceases when the right to issue an execution accrues. *Mott v. Union Bank of the City of New York*, 38 N. Y. (11 Tiff.) 18 ; S. C., 35 How. 332 ; 4 Abb. N. S. 270 ; 4 Trans. App. 291.

b. Form and contents of order. The *form* and the *contents* of an order of arrest are prescribed by section 183 of the Code, and there is but one form of this order for any case specified in section 179 of that act. Thus it is provided, that every order must require the sheriff of the county where the defendant may be found to forthwith arrest him and hold him to bail in a specified sum, and to return the order at a time and place therein mentioned, to the plaintiff or attorney by whom it shall be subscribed or indorsed. Code, § 183.

One requirement of this section is, that the order shall specify *a sum* in which the defendant may be held to bail. If the order specifies a particular sum it will be valid and regular upon its face, without any regard to the question which may subsequently arise as to the sum in which the defendant must give bail for the purpose of obtaining a release from the custody of the sheriff, where the arrest was made under the provisions of subdivision 3 of section 179 of the Code.

When the defendant is once in actual custody, under a valid order of arrest, it will be *his* duty to offer such bail as the law requires before he can be discharged from the arrest. The sum specified in the order of arrest will be the amount in all cases under section 179, unless the third subdivision is to be regarded as an exception under the provisions of sections 187 and 211. And if in such a case a different undertaking is required, it will be easy to comply with the statute by offering such an undertaking as is adapted to the circumstances of the case. *McKenzie v. Smith*, 27 How. 20.

If sections 187 and 211 prescribe what shall be a sufficient undertaking to authorize the release of the defendant from an arrest under subdivision 3 of section 179 of the Code, they do not in any manner declare what the order of arrest shall contain.

If the provisions of section 183 are complied with, the defendant may be arrested and held in custody until he complies with the requirements of the law relating to his discharge.

The supreme court of this State give this construction to the statute, and hold that, while the order of arrest must

Order of arrest in all cases except in replevin.

specify a sum in which the defendant shall be held to bail, and that if it specifies a sum less than double the value of the property in litigation, as specified in the plaintiff's affidavits, the order will nevertheless be regular. *Tracy v. Griffin*, 50 Barb. 70; S. C., 35 How. 209. See *McKenzie v. Smith*, 27 id. 20. The reverse of this rule is maintained by the superior court. *Sherlock v. Sherlock*, 7 Abb. N. S. 22; *Elston v. Potter*, 9 Bosw. 636. The amount of bail required to obtain the release of a defendant from arrest usually depends upon the nature of the action, the amount of damages claimed and the residence of the defendant. If the defendant is a non-resident, a greater sum should be specified in the order of arrest than would be required of a citizen of this State. *Baker v. Swackhamer*, 3 Code R. 248.

The true christian and surname of the party to be arrested should be given in the order when such name is known. But when the plaintiff is ignorant of the true name of the defendant, he may designate him in the order by any name or by any description, alleging, at the same time, that the name is a fictitious one, and that the true name of the defendant is unknown. Code, § 175; *Pindar v. Black*, 4 How. 95; S. C., 2 Code R. 53; *Crandall v. Beach*, 7 How. 271.

It is a rule in civil as well as in criminal cases, that the process for the arrest of an individual must so describe the person intended that the officer may know whom to arrest, and the party whose liberty is threatened may know whether he is bound to submit. And if the true party, against whom the order was sought, is misnamed in such order, and arrested under a wrong name, all concerned in the arrest are liable in an action for a false imprisonment. The fact that the party intended was arrested, and that sufficient grounds for an arrest exists against him, will not justify his arrest under a wrong name. *Miller v. Foley*, 28 Barb. 630; *Griswold v. Sedgwick*, 6 Cow. 456; S. C., 1 Wend. 126; *Scott v. Ely*, 4 id. 555; *Mead v. Haws*, 7 Cow. 832.

Order of Arrest, in all cases except in Replevin.

SUPREME COURT.

John Doe	}
agt.	
Richard Roe.	

To the sheriff of the _____ county of _____

You are required forthwith to arrest the defendant in this action, and hold him to bail in the sum of _____ dollars by _____

Order of arrest in replevin — When returnable — Indorsement.

a written undertaking, executed by two or more sufficient sureties, to the effect that the *defendant* shall at all times render himself amenable to the process of the court during the pendency of this action, and to such as may be issued to enforce the judgment therein, and to return this order to _____, *plaintiff's attorney*, at _____, within _____ days after the arrest of the *defendant*.

(Date.)

(Signature of Judge.)

(Signature of Plaintiff's Attorney.)

Order of Arrest in Replevin.

SUPREME COURT.

John Doe
agst.
Richard Roe.

}

To the sheriff of the _____ county of _____

You are required forthwith to arrest the *defendant* in this action, and hold him to bail by a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound to the *plaintiff* in the sum of _____ dollars, for the delivery to him of the property mentioned in the affidavit by or on behalf of the *plaintiff* herein, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the *defendant*, and to return this order to _____, *plaintiff's attorney*, at New York, within _____ days after the arrest of the *defendant*.

(Date.)

(Signature of Judge)

(Signature of Plaintiff's Attorney.)

c. *When returnable.* The Code requires that the order of arrest shall direct the sheriff to return the order, at a time and place therein mentioned, to the plaintiff or attorney, by whom it shall be subscribed or indorsed. Code, § 183. But this provision of the Code does not require that the order should name a day certain for its return; but it may direct that it be returned within a specified period after the arrest of the defendant. *Continental Bank v. De Mott*, 8 Bosw. 696. But it should not be made returnable on Sunday. *Gould v. Spencer*, 5 Paige, 541; *Wright v. Jeffrey*, 5 Cow. 15; *Boyd v. Vanderkemp*, 1 Barb. Ch. 273; *Stone v. Martin*, 2 Denio, 185. If the defendant be not arrested before return day a new order should be procured.

d. *Indorsement.* If the action is for the recovery of any penalty or forfeiture, a general reference to the statute by which the action is given must be indorsed on the order of arrest. 2 R. S. 481 (503), § 7. This reference should be sufficiently explicit

Attachment at the same time — Delivery to sheriff — Arrest, how made.

to enable the defendant to determine with certainty under what statute the action is brought, and this result may most readily be accomplished by a reference to chapter, title and section. See *Perry v. Tynen*, 22 Barb. 137; *Andrews v. Harrington*, 19 id. 343; *Avery v. Slack*, 17 Wend. 85; *Marselis v. Seaman*, 21 Barb. 319. See *ante*, 482.

e. Attachment at the same time. In cases in which the plaintiff has a right to a warrant of attachment given to him by the Code, and at the same time is entitled to an order of arrest under section 179, as where the defendant has removed or disposed of his property, or is about to do so with intent to defraud his creditors, a warrant of attachment may be obtained against the property of the defendant, simultaneously with an order of arrest against his person. See *Lithaner v. Turner*, 1 Code R. N. S. 210, and *Fowler v. Brock*, there cited; *Beebe v. Rogers*, MSS. decision cited in Hoff. Prov. Rem. 414.

f. Delivery to sheriff. The affidavit and order of arrest, with the necessary copies, should be delivered to the sheriff, who, upon arresting the defendant, must deliver to him a copy of both the affidavit and the order. Code, § 184.

An omission to deliver to the defendant a copy of the order is not, however, such an irregularity as to render the proceedings under the order void. The provision of the Code, in this particular, is only directory, and the court may by virtue of section 174, in its discretion, allow an amendment of the proceedings so as to make them conform to the requirements of the statute. *Barker v. Cook*, 40 Barb. 254; S. C., 25 How. 190; 16 Abb. 83; *Courter v. McNamara*, 9 How. 255; *Keeler v. Belts*, 3 Code R. 183.

ARTICLE VI.

ARREST, HOW MADE.

Section 1. Arrest, how and by whom made.

a. By sheriff. The order of arrest is usually directed to the sheriff of the county where the defendant is to be found and he forthwith proceeds to execute it, either in person or by his under-sheriff, or, what is the more usual practice, by one of his general deputies. The sheriff has power, also, to specially deputize any person selected by the plaintiff or his attorney, to execute the order. So also the under-sheriff or a general deputy may

Arrest, how and by whom made.

appoint a special deputy to do a particular act, as to arrest a defendant on an order, although he cannot confer general powers. 1 R. S. 379 (352), § 73; *Boughton v. Brace*, 20 Wend. 234; *Hall v. Fisher*, 9 Barb. 17, 25; *Hunt v. Burrel*, 5 Johns. 137.

But, while the sheriff is responsible for the act of his deputy, he is not responsible for the acts of his special deputies when employed at the request of the plaintiff or his attorney, nor can he be compelled to return process executed by them. *De Moranda v. Dunkin*, 4 Term R. 119; *Hamilton v. Dalziel*, 2 Wm. Bla. 952. See *Lawrence v. Graham*, 9 Wend. 477. So a general deputy may be made the agent of the plaintiff or his attorney, by receiving special instructions from either, as to the manner of executing the order of arrest. And where these instructions direct the deputy to depart from the line of his official duty, the sheriff will be discharged from all liability to the plaintiff for any misconduct of the deputy in following or attempting to follow the instructions so given. *Root v. Wagner*, 30 N. Y. (3 Tiff.) 9; *Sheldon v. Paine*, 10 N. Y. (6 Seld.) 398; S. C., 7 N. Y. (3 Seld.) 453; *Walters v. Sykes*, 22 Wend. 566; *Godfrey v. Gibbons*, id. 569; *Gorham v. Gale*, 6 Cow. 467, note; S. C., 7 Cow. 739. The plaintiff should carefully avoid all unnecessary interference either in the selection of the officer to execute the order, or in the manner of its execution. *Ib.* See *Ford v. Leche*, 6 Ad. & Ell. 699.

The coroner has all the powers of a sheriff to execute an order of arrest when the order is directed against the latter officer. *Slater v. Wood*, 9 Bosw. 15. The Revised Statutes provide that whenever the sheriff of any county shall be a party to any suit, all process in such suit, except when otherwise provided by law, shall be executed by the coroner of the county to whom the same shall be delivered, in the same manner in all respects, subject to the same obligations and liabilities, and with the like authority and entitled to the same privileges as are prescribed by law in respect to sheriffs, except in cases otherwise especially provided for. 2 Revised Statutes, 441, sections 84, 87 (460), and section 419 of the Code provides for the execution of an order of arrest in the like manner as upon process, and also provides, that if the sheriff is a party the coroner shall be bound to perform the service as he is now bound to execute process where the sheriff is a party, and that all the provisions of this act relating to sheriffs shall apply to the coroner when the sheriff is a party.

Duty and time of making arrest.

If the order of arrest be directed to the coroners of the county generally, it may be executed by any one of them.

But where the coroner is also a party, the arrest must be made by one or more persons, termed elisors, specially appointed by the court for that purpose. *Jackson v. Rathbone*, 3 Cow. 296; *People v. Palmer*, 1 id. 32; *Anonymous*, 23 Wend. 102. The application for the appointment of an elisor must be made to the court, and cannot be granted by a judge at chambers. *Anonymous*, 23 Wend. 102.

b. Duty of making arrest. The Code declares that it shall be the duty of the sheriff, on the receipt of the affidavit and order of arrest, to execute the order by arresting the defendant and keeping him in custody until discharged by law. Code, § 185. And it further provides, that whenever, pursuant to this act, the sheriff may be required to serve or execute any summons, order or judgment, or to do any other act, he shall be bound to do so in like manner as upon process issued to him, and shall be equally liable in all respects for neglect of duty. Code, § 419. The order of arrest commands the sheriff to make the arrest, and for disobedience to such order, he is liable to attachment, as for a contempt. 2 R. S. 534 (553). In addition to this, he is liable to an action, at the suit of any party aggrieved, for the damages sustained by him. 2 R. S. 440 (459), § 77, 739, § 98. The measure of damages, in an action of this nature, would not be the face of the debt, as upon an execution, but what the plaintiff could prove as actually accruing through delay in recovering the debt. *Planck v. Anderson*, 5 Term R. 37.

c. Time of making arrest. An order of arrest may be served at any hour of the day or night. *Priddee v. Cooper*, 1 Bing. 66; *Mand v. Barnard*, 2 Burr. 812; *Anonymous*, 2 Chitty, 357. But the order must not be served after return day, nor on Sunday, nor on an elector entitled to vote on the day and in the town where an election is being held. 1 R. S. 675 (628), § 69; 1 id. 118; Laws of 1842, ch. 130, § 4; *Rob v. Moffat*, 3 Johns. 257; *Van Vechten v. Paddock*, 12 id. 178. But this exemption from arrest on Sunday does not extend to a prisoner who has escaped, nor does it affect the arrest of a prisoner by his bail. In either case the prisoner is considered continually in custody. Sewell on Sheriffs, 117. If the defendant has not been arrested before the day fixed in the order for the return, the order may be amended by the judge who granted it, and the time for

Irregular or illegal arrest.

making the arrest extended. This, in effect, is equivalent to the granting of a new order.

d. Irregular or illegal arrest. The officer before making the arrest should satisfy himself that the party whom he is about to arrest is the party named in the order, and that the name of the defendant is correctly given therein. The arrest of the right person under a wrong name will render the officer liable to an action for false imprisonment as certainly as where the wrong party is imprisoned; or, the fact that the person intended was the party arrested will afford no justification to the officer making the arrest. *Miller v. Foley*, 28 Barb. 630; *Farnham v. Hildreth*, 32 id. 277; *Evans v. Collins*, 5 Ad. & El. N. S. 804; *Brunskill v. Robertson*, 9 Ad. and El. 840; *Childers v. Wooler*, 2 E. and E. 287. Section 175 of the Code authorizes the arrest of a defendant under a fictitious name where the true name of the defendant is unknown. *Pindar v. Black*, 4 How. 95; S. C., 2 Code R. 53. In such cases the order of arrest must contain such matters of description as will enable the officer to identify the party arrested as the party named in the order. The sheriff is bound to arrest only the person named in the writ; and when the sheriff is informed of a misnomer or a misdescription of the person, though the party be pointed out as being the one against whom the order of arrest was issued, he is not bound to make the arrest. *Morgans v. Bridges*, 1 Barn. and Ald. 647, 650; *Shadgett v. Clipson*, 8 East, 328; *Cole v. Hindson*, 6 Term R. 234. And if the sheriff arrests a person not answering to the description given in the order, he is liable to an action for a false imprisonment. *Money v. Leach*, 3 Burr. 1742, 1763. But where the defendant represents himself as the party against whom the order is directed, and he is thereupon arrested, he cannot bring an action against the sheriff for such imprisonment. *Morgans v. Bridges*, 1 Barn. and Ald. 647, 651.

But the sheriff will be liable for detaining the defendant in custody after he becomes aware that he has arrested the wrong person notwithstanding such representations. *Dunston v. Pater-son*, 2 C. B. N. S. 495. See *Kelly v. Lawrence*, 3 Hurl. & Colt. 1; *Walley v. McConnell*, 13 Ad. & El. N. S. 903. The plaintiff does not become liable to the sheriff for the damages paid by the latter in an action for false imprisonment brought by a person of the same name as the defendant mentioned in the order, although the arrest of such person was made by the sheriff on

Place of arrest.

representations of the plaintiff, *made in good faith*, that the person arrested was the party against whom the order was directed. *Collins v. Evans*, 5 Ad. & El. N. S. 820, 830. In such a case the sheriff can exercise his own discretion, whether to act on such representations or not. He is bound to obey only the mandatory part of the order, which directs him to arrest the party named therein, and it is his duty to determine whether the party he is about to arrest is the one designated in the order. Having determined, he acts on his own responsibility. The rule would be otherwise if the plaintiff required him to arrest the party before him. *Collins v. Evans*, 5 Ad. & El. N. S. 830. The sheriff's liability for the acts of his deputies is measured by his liability in case such acts had been his own. *People v. Schuyler*, 4 N. Y. (4 Comst.) 173.

e. Place of arrest. An arrest to be valid must be made within a county where the officer making it could act in his official character. The official capacity or powers of a sheriff exists only within the limits of his county. *Farmers' Loan & Trust Co. v. Dickson*, 9 Abb. 61; S. C., 17 How. 477. And an arrest made by him beyond such territorial limits will be void. The order is directed to the sheriff of a specified county, and must be made by him or his deputies within that county. *Devenege v. Dalby*, 1 Doug. 383; *Hammond v. Taylor*, 3 Barn. & Ald. 408; *Chase v. Joyce*, 4 Maule & Selw. 412. And the fact that the arrest was made on the verge of an adjoining county will not cure the illegality of the act, where there is no dispute as to the boundaries. *Hammond v. Taylor*, 3 Barn. & Ald. 408. But, before an arrest will be vacated, because made out of the proper county, there must be a positive affidavit showing that there could be no dispute as to the boundary. *Swiss v. Williams*, 1 Chitty, 15, *n*; *Thomson v. Burton*, 1 Dowl. P. C. 428; *Coulson v. King*, 2 Cr. & J. 474. See also *Monday v. Sear*, 11 Price, 122. And it must also be shown that the place where the arrest was made was not on the confines of the county in which the order was to be served. *Storer v. Rayson*, 3 Barn. & Cress. 158.

The rule that a sheriff may make an arrest at any place within his county has but one modification. The law does not permit him to forcibly enter a dwelling to make an arrest, but preserves the letter and spirit of the old maxim of the Year book, that a man's dwelling-house is his castle. *People v. Hubbard*, 24 Wend. 369; *Curtis v. Hubbard*, 4 Hill, 437. And this protec-

Place of arrest.

tion from arrest is not a mere personal privilege, confined to the owner of the dwelling, but extends to his family and the regular inmates of the house, so long as it is occupied as his residence. *Curtis v. Hubbard*, id. 437; *Glover v. Whittenhall*, 6 id. 597. And where a whole house is let in lodgings, the separate room of each individual lodger is his dwelling, and in it he is entitled to the protection extended to the owner and occupant of a whole house. But this rule does not apply to houses other than those devoted to such purposes. *Lee v. Gansel*, 1 Cowp. 1; *Williams v. Spencer*, 5 Johns. 352. Where the sheriff finds the door of a dwelling-house closed he cannot legally force an entrance by breaking down the outer door. *Curtis v. Hubbard*, 4 Hill, 437; *Glover v. Whittenhall*, 6 id. 597. And even lifting the latch by which the door is fastened is breaking the door within the meaning of the law. *Ib.* But where the outer door is open the sheriff may legally enter and arrest a defendant, and if necessary, in the execution of his duty, may break down any inner door, after a demand for admittance. *Haggerty v. Wilber*, 16 Johns. 287; *Hubbard v. Mace*, 17 id. 127.

The sheriff must effect an entrance peaceably and without resorting to fraud, or the arrest will be held illegal. *Parke v. Evans*, Hob. 62, *a.* And where the door of a house is opened on the request of the sheriff, and he is invited to enter, he may legally do so and execute an order of arrest. But where the door is opened for the purpose of seeing who may be demanding admittance the sheriff cannot rush by the person opening the door, against the will of such person, and thereupon make a legal arrest. *Parke v. Evans*, Hob. 62.

And a sheriff cannot in any case lawfully break down any door whatever for the purpose of making an arrest without first demanding admittance and being denied an entrance, except when in actual pursuit of a prisoner who has escaped and is consequently aware of the object of the pursuit. *Glover v. Whittenhall*, 6 Hill, 597; *Allen v. Martin*, 10 Wend. 301. But if, after gaining a peaceable entrance, and arresting a defendant, the officer is forcibly ejected from a house, he may lawfully break down the door to retake his prisoner, without first making a demand for an entrance. *Allen v. Martin*, 10 Wend. 301.

The privilege which the law allows to a man's habitation, and which precludes the sheriff from entering, unless the outer door be open, to arrest the party, does not extend to a store or barn

Place and mode of arrest.

disconnected from the dwelling-house and occupying no part of the inclosure in which the latter is situated. *Haggerty v. Wilber*, 16 Johns. 287.

In entering a building not occupied as a residence, the same formalities need not be observed, although a demand that the door be opened and admittance given to the officer is always proper.

But the privilege that the owner enjoys in his own house does not extend to a stranger who has taken refuge there to avoid arrest, and it is the duty of the owner, on the demand of the sheriff, to open the door of the house, and on his refusal the officer may break down the door and arrest the prisoner. *Semayne's Case*, 5 Coke, 93.

So where a sheriff enters the house of a stranger in search of the defendant, he is liable in an action of trespass for entering and breaking the house, unless he can show that the defendant was actually there at the time of the alleged trespass. *Johnson v. Leigh*, 6 Taunt. 246; S. C., 1 Marsh. 565.

A sheriff cannot justify breaking the inner doors of the house of a stranger, upon *suspicion* that the defendant is there. *Ib.* And this rule holds although the defendant resided there immediately before the entry. *Morrish v. Murrey*, 13 Mees. & Wels. 52.

f. Mode of arrest. The Code nowhere prescribes the manner in which an arrest must be made, but directs that the sheriff shall execute the order by arresting the defendant and keeping him in custody until discharged by law; and that he may call the power of the county to his aid in the execution of the order, as in case of process. Code, § 185.

The rules of law governing arrests, and the modes of their application, have undergone but few changes for centuries; and so thoroughly are these rules understood, and their application to each case that may arise so clearly shown in some previous decision, that no late reported decisions of the courts of this State have been given or needed to establish the practice in this particular. These rules as applied to the present practice may be stated as follows: An arrest to be valid, in a civil action under the Code, must be made under and in pursuance of an order of the court. Code, §§ 178, 179, 180, 183, 185. *Attorney-General v. Dorkins*, 11 Price, 156; *Attorney-General v. Cass*, *id.* 345. The order must be valid on its face. *Hooper v. Lane*, 10

 Mode of arrest.

Ad. and El. N. S. 546. And must be executed by the officer to whom it is directed or his deputy. *Humphrey v. Mitchell*, 2 Bing. (N. C.) 619. The officer may execute the order by seizing the person of the defendant and restraining his personal liberty by actual force. *Harrison v. Hodgson*, 10 Barn. & Cress. 445; *Howden v. Standish*, 6 Man., Grang. & Sc. 504, 521; Code, § 185. Or the arrest may be made without any seizure or touching of the person of the defendant if no resistance is made to the officer and the defendant acquiesces in the arrest. *Gold v. Bissell*, 1 Wend. 215; *Russen v. Lucas*, 1 Carr. and Payne, 153; *Grainger v. Hill*, 4 Bing. (N. C.) 212, 219. But words such as "I arrest you" will not of themselves constitute an arrest; but if after such words the defendant goes with the officer it is an arrest. *Russen v. Lucas*, 1 Carr. and Payne, 153. The only requisite of a valid arrest is the submission of the defendant to the authority of the officer; and it is immaterial whether this submission was given willingly or on compulsion. *Gold v. Bissell*, 1 Wend. 210, 215; *Jones v. Jones*, 13 Ired. 448; *Field v. Ireland*, 21 Ala. 240. An arrest is generally made by touching the party named in the order and at the same time accompanying the act by words, that in effect informs him that he is a prisoner. This is in all cases a valid arrest. *Sandon v. Jervis*, 1 Ell., B. & El. 946; *Genner v. Sparks*, 6 Mod. 173; S. C., 1 Salk. 79.

Actual contact is not necessary to constitute an imprisonment. Any restraint put upon the freedom of another by show of authority or force is sufficient to constitute an imprisonment; so that, if a person is restrained from leaving a room or going out of a house, without the presence of an officer, this infringement of his personal liberty will constitute an imprisonment. *Warner v. Rid-diford*, 4 C. B. N. S. 180, 206. If an officer who has a process against any one says to him, "You are my prisoner, I have a writ against you," upon which the person addressed submits, turns back and goes with him, though the officer never touched him, yet it is an arrest, because he submitted to the process. *Grainger v. Hill*, 4 Bing. (N. C.) 212. If a person is commanded by an officer to go with him, and the order is obeyed, and they walk together in the direction pointed out by the officer, that is constructively an imprisonment, though no actual force be used, for the party addressed feels that he has no option, no more power of going in any but the one direction prescribed to him than if the officer had actual hold of him, and it is that entire

Mode of arrest—Notice to sheriff not to arrest.

restraint upon the will which constitutes the imprisonment. *Bird v. Jones*, 7 Q. B. 742; 2 Inst. 589; Bull. N. P. 62. "If you put your hand upon a man, or tell him he must go with you, and he goes, supposing you have the right and power to compel him, that is an arrest." TINDAL, C. J., *Wood v. Lane*, 6 C. & P. 774. But a partial restraint of the will of a person is not sufficient to constitute an imprisonment. Thus, where a part of a public foot-way on a bridge was taken and appropriated for seats to view a regatta, and separated for that purpose from the adjoining carriage road by a temporary fence, and the plaintiff insisted upon a right of way across the part so appropriated, and climbed over the fence, but was stopped by two policemen, who prevented him from proceeding onward, but at the same time told him he might go back if he pleased, which the plaintiff refused to do, and remained where he was for half an hour, it was held that this was no imprisonment. *Bird v. Jones*, 7 Q. B. 742.

Although the sheriff is not justified in breaking down the door of a house to arrest the owner, yet it has been held in repeated cases that where the officer could touch the defendant without breaking the house, as through an open window, or through a pane of glass previously broken, the arrest is complete, and the officer may legally break down the door to remove his prisoner. *Ib.*; *Anonymous*, 7 Mod. 8. In all cases it must be understood that the act is accompanied by words calculated to inform the defendant of its meaning, and that he is a prisoner by virtue of that act. The party arrested is constructively, rather than actually, in the power of the officer at the moment of arrest. But, having made a technical arrest, it is the duty of the officer to execute the remaining mandate of the order and keep the defendant in custody until discharged by law. The courts will not regard with leniency the escape of a prisoner from the custody of the sheriff. *Crompton v. Ward*, 1 Stra. 429, 436. And it is a rule of law that, when an officer is charged with the execution of an order of arrest, it is his duty to take with him such force as will overcome any resistance which he could reasonably anticipate. *Howden v. Standish*, 6 Man., Grang. & Sc. 504; S. C., 6 Dowl. & Lownd. 312.

g. Notice to sheriff not to arrest. It sometimes happens that after the order of arrest has been delivered to the sheriff, the matter in controversy may have been compromised between the

Fraudulent arrest — Detainer, person in custody of the law.

parties and that the execution of the order will be no longer desirable or even legal, under the changed circumstances of the case. In such cases the plaintiff may countermand the order of arrest by directing the sheriff not to execute it. It is true that the sheriff is an officer of the court, and that he is commanded by the judge thereof to arrest the defendant; but the order is granted at the instance and for the benefit of the plaintiff, and the practice of the court in this respect is to treat the sheriff as the agent of the plaintiff and hold him subject to his direction. And if the sheriff, after a direction from the plaintiff not to execute an order of arrest, disregards the order and arrests the defendant, he becomes a trespasser and is liable to an action. *Semple v. Keene*, 3 Hurl. & Norm. 753. And the same rule holds where the sheriff detains the defendant in custody after he has notice from the plaintiff that the cause of action no longer exists. *Barker v. St. Quintin*, 12 Mees. & Wels. 440; *Withers v. Henley*, Cro. Jac. 379; *Futcher v. Hindér*, 3 Hurl. & Norm. 757.

h. Fraudulent arrest. It has been stated in a previous section that a sheriff cannot legally make an arrest beyond the limits of his own county. *Ante*, 657. And the rule is equally clear, that a defendant will be discharged from arrest whenever it appears that the arrest was effected by enticing him, by means of false representations, within the county of the sheriff, in whose hands an order of arrest had been placed. If a party who is not within the jurisdiction of a court voluntarily comes within it, he thereby becomes amenable to its process, but not unless he comes voluntarily. And the courts will not sanction any attempt to bring a party within its jurisdiction by fraud and misrepresentations. *Carpenter v. Spooner*, 2 Sandf. 717; S. C., 2 Code R. 140; *Goupil v. Simonson*, 3 Abb. 474; *Benninghoff v. Oswell*, 37 How. 235; *Metcalf v. Clark*, 41 Barb. 45; *Stein v. Volkenhuysen*, El. Bla. & El. 65; *Wells v. Gurney*, 8 Barn. & Cress. 769; *Williams v. Bacon*, 10 Wend. 636.

i. Detainer, person in custody of the law. Where a defendant is already in the custody of the law, and a second order of arrest issues against him, he may be detained in custody by the sheriff to answer to the new demand made against him, although he has been regularly discharged from custody in the first action. This detainer has the force and effect of a second arrest and is effected by lodging in the hands of the sheriff who has the defendant in custody, the second order of arrest with the

Service of papers on defendant — Power of the county.

affidavit on which it was granted. *Barclay v. Faber*, 1 Chitty, 578; S. C., 2 Barn. & Ad. 743. But where a defendant is wrongfully taken without process, or after it is returnable, he cannot be lawfully detained in custody under subsequent process at the suit of the same plaintiff, although the second process was regularly issued. *Loveridge v. Plaistow*, 2 H. Bla. 20; *Barlow v. Hall*, 2 Anstr. 461. And the same rule applies to process issued at the suit of plaintiffs who were cognizant of the irregularity of the previous arrest, or who were in some manner in collusion with the original plaintiff, or the officer who made the arrest. *Spence v. Stuart*, 3 East, 89. But a defendant wrongfully arrested is not entitled to be discharged from subsequent detainers unless there has been such collusion between the plaintiffs in those causes and the person by whom such defendant was originally arrested. *Barclay v. Faber*, 1 Chitty, 578; S. C., 2 Barn. & Ad. 743. The same principles apply to detainers where the original arrest was under criminal process on a pretended criminal charge, but, in fact, to gain possession of the defendant's person in order to lodge a detainer with the sheriff in a civil action. *Williams v. Bacon*, 10 Wend. 636. But, where the criminal charge was preferred in good faith, a detainer will lie, although in a civil action, at the suit of the complainant in the original action. But leave of the court must be first obtained. *Ib.*, and see *Lucas v. Albee*, 1 Denio, 667.

j. Service of papers on defendant. It is the duty of the sheriff on arresting the defendant to serve upon him a copy of the affidavit and order of arrest. Code, § 184. But an omission to serve such copies on the defendant is not such an irregularity as will render the proceedings void. The proceedings may be amended in this particular, under section 174 of the Code. *Courter v. McNamara*, 9 How. 255; *Keeler v. Belts*, 3 Code R. 183. And where the copy of the affidavit served contains no signatures of the affiant or of the officer before whom the affidavit was sworn to, the irregularity will not be a valid ground for vacating the order of arrest. *Barker v. Cook*, 40 Barb. 254; S. C., 25 How. 190; 16 Abb. 83. And see *Graham v. McCoun*, 5 How. 353; S. C., 1 Code R. N. S. 43.

k. Power of the county. The statute provides, that "whenever a sheriff or other public officer authorized to execute any process delivered to him, shall find, or have reason to apprehend, that resistance will be made to the execution of such process, he shall

Exemption from arrest.

be authorized to command every male inhabitant of his county, or as many as he shall think proper, and with such arms as he shall direct, and any military company or companies in said county, armed and equipped, to assist him in overcoming such resistance; and, if necessary, in seizing, arresting and confining the resisters, their aiders and abettors, to be dealt with according to law." Laws of 1845, ch. 69, § 18; 1 R. S. (5th ed.) 750, § 88; *Boyles v. Hurtin*, 10 Johns. 85. And it is provided by section 185 of the Code, that the sheriff, in the execution of an order of arrest, may call the power of the county to his aid, as in case of process. In the execution of an order of arrest, the sheriff is not supposed to be continually attended by a posse, and the law will regard with leniency a failure to retain the defendant in custody, where the failure resulted from the unexpected interference or resistance of a superior force. But no return of an escape or rescue will exonerate the sheriff from liability to the plaintiff for the damage he may sustain from the failure to take and retain the defendant in custody, when such resistance could have been reasonably anticipated and prevented. *Crompton v. Ward*, 1 Stra. 419. The law not only authorizes but requires the sheriff to provide such force as shall enable him to execute the process of the court, in spite of any resistance he has reason to anticipate. *Howden v. Standish*, 6 Man., Grang. & Sc. 504; S. C., 6 D. & L. 312. See *Burdett v. Colman*, 14 East, 163.

1. *Exemption from arrest.* Where a defendant is clearly privileged from arrest, no advantage can accrue to the plaintiff from the execution of the order, as the courts will, on the application of the defendant, immediately order his discharge. In certain cases, the arrest of a defendant while privileged will render the officer liable to an action for damages. As, where a witness has been arrested while attending a court to which he has been duly subpoenaed, the officer making such arrest will be liable to the witness for three times the amount of the damages which may be found by the jury, and will also be liable to an action at the suit of the party who subpoenaed such witness, for the loss, hindrance and damages sustained by him in consequence of such arrest. 2 R. S. 402 (419), § 54.

And where a sheriff has an order of arrest against a party claiming to be exempt as a witness, he should require the party to make an affidavit that he has been legally subpoenaed as a witness to attend before some court or officer, specifying such

Showing process — Handcuffs on defendant — Extortion — Discharge.

court or officer, the place of attendance, and the cause in which he was subpœnaed; and that he has not been subpœnaed by his own procurement, with the intent of avoiding the service of any process. If the defendant refuse to make such an affidavit he should be arrested by the sheriff and kept in custody until discharged by the court. 2 R. S. 402 (419), § 55.

With the exception of a witness who has made the foregoing affidavit, or a party clearly exempt as an ambassador or foreign minister, or the domestic servant of an ambassador or foreign minister, the safer course for the sheriff to pursue is to arrest the defendant named in the order, and leave him to apply to the court for a discharge. As to who are exempt from arrest, see art. 3, *ante*, 589 to 605.

m. Showing process. A regular officer is not bound to exhibit the original order of arrest when he arrests a defendant, but may serve a copy only. The rule is different when applied to an arrest made by a special deputy. He should in all cases produce the original order of arrest, and exhibit it to the defendant when so requested. But a refusal to do so will not constitute him a trespasser, if he can show that he had a regular, legal order in his possession which authorized the arrest. *Arnold v. Steeves*, 10 Wend. 515; *Bellows v. Shannon*, 2 Hill, 86.

n. Handcuffs on defendant. It is clearly illegal for an officer after an arrest on civil process to handcuff or manacle the defendant, unless he has attempted to escape or rescue himself. *Wright v. Court*, 4 Barn. & Cress. 596; S. C., 6 Dowl. & Ry. 623.

o. Extortion. By the practice of the English courts, and under the English statutes, an officer is liable to treble damages for exacting from the defendant more than the fees allowed by law for making an arrest.

p. Discharge, if arrest illegal. Whenever the sheriff discovers that an arrest made by him is illegal on account of some material defect in the order, or on account of privilege, or of misnomer of the party arrested, he should either immediately discharge the party arrested or apply to the court for an order to that effect. As the arrest is illegal, the continued imprisonment of the defendant cannot cure the defect, but only adds to the sheriff's liability in an action for false imprisonment. *Morgans v. Bridges*, 1 Barn. & Ald. 647; *Brunskill v. Robertson*, 9 Ad. & El. 840; *Dunston v. Paterson*, 2 C. B. N. S. 495. And where the sheriff discharges a defendant on the grounds before

Bail by defendant, and time allowed for.

mentioned, he is not liable to the plaintiff in an action for an escape. *Ib.*

Section 2. Bail by defendant, and time allowed for.

a. Bail, when given. The defendant may give bail whenever arrested, at any hour of the day or night, and he is entitled to a reasonable opportunity to procure it before being committed to prison. This privilege can be claimed at any time after arrest and before execution. Code, § 186. There are no reported decisions as to what constitutes "a reasonable opportunity" to procure bail. Under the English statutes, it is the imperative duty of the officer, on making an arrest, to immediately inform the defendant that he is at liberty to be taken to any safe and convenient house of any third person, designated by him, if within the county and within three miles of the place of arrest, and to remain there during the next twenty-four hours. *Dewhirst v. Pearson*, 1 Crompt. & Mees. 365 ; S. C., 3 Tyrwh. 242 ; *Simpson v. Renton*, 5 Barn. & Ad. 35. On giving bail the defendant is entitled to an immediate discharge from arrest. But before releasing the defendant the sheriff should, as a measure of precaution, assure himself that no detainer has been lodged with him while the prisoner was in custody, and, by reason of which, he may become liable for an escape.

ARTICLE VII.

PROCEEDINGS AFTER ARREST.

Section 1. Keeping the defendant in safe custody or in jail.

a. In general. The Code requires the sheriff, after the arrest of the defendant, to keep him in safe custody until discharged by law. Code, § 185. In performing this duty the sheriff may place the defendant in actual confinement within the walls of the jail, or, on the receipt of the proper bond, may permit the defendant to go at large within the jail limits. Usually, a defendant arrested in a civil action is allowed the jail liberties. In either case the sheriff is responsible for the safe keeping of his prisoner until the latter is discharged by law. *Sartos v. Mercereau*, 9 How. 188 ; *Buckman v. Carnley*, *id.* 180 ; *Lockwood v. Mercereau*, 6 Abb. 206 ; *Metcalf v. Stryker*, 31 N. Y. (4 Tiff.) 255.

There are three ways provided by the Code, by either of which

 Discharge on deposit in lieu of bail — Bail, how given.

the defendant may be discharged from arrest, and the liability of the sheriff terminated. The defendant may secure his discharge by giving bail, as provided by sections 187, 211; or by a deposit of money with the sheriff, to an amount equal to the sum mentioned in the order of arrest, under section 197; or, in proper cases, the defendant may obtain an absolute discharge by moving for an order vacating the order of arrest, as provided by sections 204, 205.

So a defendant may be released from arrest by the consent of the plaintiff's attorney. But a release so obtained will not operate as a vacatur or discharge of the order, but simply as a voluntary escape, or like a release on common bail under the old practice. *Meech v. Loomis*, 28 How. 209; S. C., 23 id. 484; 14 Abb. 428; S. C. affirmed, id. 432, note. See *Decker v. Judson*, 16 N. Y. (2 Smith) 439; *Winter v. Kinney*, 1 N. Y. (1 Comst.) 365.

b. Discharge on deposit of amount stated in order of arrest. The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff shall thereupon give the defendant a certificate of the deposit, and the defendant shall be discharged out of custody. Code, §§ 186, 196.

Certificate of Deposit in lieu of Bail.

(Title of cause.)

This is to certify that I have received from Y. Z., the above-named defendant, the sum of dollars, as a deposit in lieu of bail, being the amount mentioned in the order of arrest in this action.

(Date.)

(Signature.)
 Sheriff of County.

c. Bail, how given. The defendant may give bail, by causing a written undertaking to be executed by two or more sufficient bail, stating their places of residence and occupations, to the effect that the defendant shall at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein. Code, § 187. When the action falls within the third subdivision of section 179 of the Code, the condition of the undertaking must be adapted to the character of the action.

In executing an undertaking of bail, a strict compliance with

Bail, how given.

the statute is necessary. There is a broad distinction made by the courts in relation to the security taken by the plaintiff and that taken by the sheriff, where the security is given to procure a discharge from arrest. The only mode by which the sheriff can discharge from arrest is that prescribed by statute; and he cannot take any obligation or security from the party in custody, conditioned otherwise than for his appearance at the day and place mentioned in the process. Should he take an undertaking otherwise conditioned, the act would be void as being without authority, and he would not be protected by it if an action should be brought by the party at whose suit the arrest was made, and the agreement or security being without consideration, so far as the officer was concerned, could not be enforced by him. *Winter v. Kinney*, 1 N. Y. (1 Comst.) 365; *Shaw v. Tobias*, 3 id. (3 id.) 188, 192.

But this restriction is confined to public officers; and the plaintiff may make such agreement, or take such security as he pleases, on discharging the defendant from arrest. *Ib.* *Rogers v. Reeves*, 1 Term R. 418; *Fuller v. Prest*, 7 id. 109; *Decker v. Judson*, 16 N. Y. (2 Smith) 439, 443; *Armstrong v. Garrow*, 6 Cow. 465; *Richmond v. Roberts*, 7 Johns. 319; *Webber's Executors v. Blunt*, 19 Wend. 188.

But the statute of frauds requiring the agreement and consideration to be in writing, while it applies to agreements where the consideration is the subject of mutual arrangement between the parties, does not apply to instruments given or executed under, and deriving their obligation from, special statutes, without the acceptance and assent of the party for whose ultimate benefit they are given.

A mere undertaking or promise does not, *ex vi termini*, import a consideration. But where the statute requires an undertaking to be entered into by sureties, an instrument containing the requisite stipulations is valid, although it does not express a consideration, and is not under seal. *Thompson v. Blanchard*, 3 N. Y. (3 Comst.) 335; *Doolittle v. Dininny*, 31 N. Y. (4 Tiff.) 350; *Slack v. Heath*, 1 Abb. 331; S.C., 4 E. D. Smith, 95; *Johnson v. Ackerson*, 40 How. 222; S. C. affirmed, 3 Daly, 430. It is enough that the statute recognizes and authorizes such an instrument. *Ib.*

Where an order of arrest is granted under subdivision 3 of section 179, the undertaking must contain additional conditions

Undertaking to discharge from arrest.

to the effect that the sureties are bound in double the value of the property as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant. *Elston v. Potter*, 9 Bosw. 636; *Sherlock v. Sherlock*, 7 Abb. N. S. 22; *Tracey v. Veeder*, 35 How. 209; S. C., 50 Barb. 70; Code, §§ 187, 211. The Code does not specify to whom the undertaking shall be given, and the usual custom is to give it generally without naming the obligee. But the undertaking will not be invalid if given in the name of the plaintiff in the action. *Slack v. Heath*, 4 E. D. Smith, 95; S. C., 1 Abb. 331.

Undertaking to Discharge from Arrest—Not in Replevin.
SUPREME COURT.

A. B., plaintiff,
agst.
Y. Z., defendant.

The above defendant having been arrested by the sheriff of the county of upon an order of arrest herein.

Now, therefore, we, C. D., of the of , county of , by occupation a , and E. F., of the of , county of , by occupation a , do hereby undertake, in the sum of dollars, that the said defendant shall at all times render himself amenable to the process of the court during the pendency of this action, and to such as may be issued to enforce the judgment therein.

Dated the day of , 18 .

C. D.,
E. F.

STATE OF NEW YORK, } ss:
County of .

On this day of , in the year one thousand eight hundred and seventy , before me, the subscriber, personally appeared C. D., of , county of , and E. F. of , county of , to me known to be the same persons described in, and who executed the above undertaking, and severally acknowledged that they executed the same.

(Signature of Officer.)

STATE OF NEW YORK, } ss:
County of .

C. D. and E. F., being severally sworn, each for himself, says, the said C. D. that he is a of the county of , in this State, and that he is worth, exclusive of property exempt from execution, the sum of dollars, over and above all debts and

Undertaking of bail in replevin — Surrender of defendant by bail.

responsibilities which he owes or has incurred ; and the said E. F., for himself, says, that he is a of the county of , in this State, and that he is worth, exclusive of property exempt from execution, the sum of dollars, over and above all debts and responsibilities which he owes or has incurred.

C. D.,
E. F.

Severally sworn to and subscribed before me, this day of , 187 . (Signature.)

I certify that I find the sureties in the foregoing undertaking sufficient, and do approve of the same.

By , *Sheriff*.
 , *his Deputy*.

Undertaking of Bail in Replevin.

(*Title of cause.*)

WHEREAS, The above-entitled action has been brought to recover the possession of the following personal property : (*describe it*) which is alleged to be unjustly detained ; and, whereas, Y. Z., the defendant in such action, has been arrested therein for the cause mentioned in the third subdivision of section 179 of the Code of Procedure ;

Now, therefore, we, C. D., of the of county of , by occupation a , and E. F., of the of , of the county of , by occupation a , do hereby acknowledge ourselves bound in the sum of (*double the value of the property as stated in the plaintiff's affidavit*), for the delivery of the said personal property to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant.

C. D.
E. F.

Dated the day of , 187 .

(*Acknowledgment and justification as in preceding form.*)

Section 3. Surrender of defendant by bail.

a. Proceedings necessary. Whenever the bail desire to free themselves from the liability they have assumed, either from distrust of their ability to produce the defendant when required, or for any other cause, they may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested. The surrender is made by delivering a certified copy of the undertaking of the bail to the sheriff, and it is his duty to detain the defendant in his custody thereon, as upon an order of arrest, and to give a written certificate to the bail acknowledging the surrender. Code, § 188.

Arresting defendant for surrender.

No authority is given by the Code for the surrender of the defendant to the sheriff of any county but that in which the arrest is made, and the surrender to the sheriff of any other county would be clearly unauthorized and void. See *Mainwaring v. Milner*, 4 L. R. Q. B. 149.

b. Arresting defendant for surrender. The bail may themselves arrest the defendant for the purpose of surrendering him, at any time before they are finally charged with a failure to comply with the undertaking, and at any place where they may find him; or, by a written authority indorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to make the arrest for them. Code, § 189.

The right of the bail to arrest and surrender their principal in their own exoneration was not created by the Code, but it is as old as the right to arrest in the first instance by a duly authorized officer.

This power does not depend upon any authority or process of the court, but results from an implied contract between the principal and bail, arising out of the relation between them; the principal having been at his own request taken from the custody of the sheriff, and delivered into the custody of his bail where he is bound to remain, and, in the contemplation of the law, always does remain. The law considers the principal as a prisoner, whose jail liberties are enlarged or circumscribed at the will of his bail; and that the right of such bail to exercise a controlling power over their prisoner exists at all time and in all places. *Metcalf v. Stryker*, 31 N. Y. (4 Tiff.) 255; *Nicholls v. Ingersoll*, 7 Johns. 146.

The bail may arrest their principal on Sunday, and in his own house, and even break down the doors to effect this purpose. *Anonymous*, 6 Mod. 231; *Sheers v. Brooks*, 2 H. Bla. 120. They may also pursue and arrest him in any other county, or in another State. *Nicholls v. Ingersoll*, 7 Johns. 145; *Matter of Wolfe*, 3 N. Y. Leg. Obs. 383; *Bushnell v. Bushnell*, 15 Barb. 399; Code, § 189.

The settled rule of law, that no arrest can be maintained where the defendant has been induced to come within the jurisdiction of the court by means of any trick or fraud, does not apply to arrests of this nature. Neither does the jurisdiction of the court in any way control the authority of bail, and a surrender will not be void because the bail, by false promises, induced their princi-

 Authority from bail to arrest principal.

pal to come within the State. *Matter of Wolfe*, 3 N. Y. Leg. Obs. 383.

The right to surrender the principal is not confined to the bail as a personal privilege, but extends to their executors and administrators. *Meddowcroft v. Sutton*, 1 Bos. & Pull. 62. Neither is it essential that all the bail should unite in surrendering their principal. One may make the arrest and surrender the defendant, thereby exonerating the other bail. And this privilege extends to bail who have been excepted to and who do not justify. *In re Taylor*, 7 How. 212. And where a sheriff has become bail, he may exonerate himself from all liability as such by re-arresting the defendant. *Sartos v. Merceques*, 9 How. 188; *Metcalf v. Stryker*, 31 N. Y. (4 Tiff.) 255; affirming S. C., 31 Barb. 62; 10 Abb. 12; *Buckman v. Carnley*, 9 How. 180; *Seaver v. Genner*, 10 Abb. 256.

No process is necessary in an arrest of the principal by his bail. The defendant stands in the same relation to his bail that an escaped prisoner does to the sheriff. *Nicholls v. Ingersoll*, 7 Johns. 145; *Metcalf v. Stryker*, 31 N. Y. (4 Tiff.) 255; *Anonymous*, 6 Mod. 231. And where the bail employ any officer to make the arrest, he acts as the agent of the bail and not in his official capacity. *Harp v. Osgood*, 2 Hill, 218; *Gregg v. Pierce*, 53 Barb. 387. The same privileges are extended to the authorized agent of the bail, as to time, place, and manner of making the arrest, as may be claimed by the bail themselves. *Nicholls v. Ingersoll*, 7 Johns. 145.

Authority from Bail to Arrest Principal.

KNOW ALL MEN by these presents, that I, C. D., the within-named bail, do hereby depute, authorize and empower in my place and stead and in my behalf, O. P., of _____, (if an officer add his title) to take, arrest, seize and surrender to the sheriff of the county of _____, Y. Z., the within-named defendant, in exoneration of and discharge of my undertaking as bail for the said Y. Z., in said action, and to employ such persons and assistants as may be necessary to effect such purpose, and to do any and all acts, that I, the aforesaid bail, might lawfully do in the premises. C. D.

(Date.)

c. *Notice of surrender.* After surrendering the defendant to the sheriff, the bail should give eight days' notice to the party at whose suit the arrest was made, that they shall apply to a

Certificate of surrender — Exoneration of bail by judge.

judge of the court, or a county judge, for an order of exoneration. A copy of the sheriff's certificate, acknowledging the surrender of the defendant, must accompany the notice. Code, § 188. This also conforms to the practice of the English courts. *The King v. Sheriff's of London*, 1 Price, 338; *Merryman v. Quibble*, 1 Chitty, 128; *Byrne v. Aguilar*, 3 East, 306; *Thorne v. Hutchinson*, 3 Barn. & Cress. 112; S. C., 4 Dowl. & Ryl. 712.

Certificate of Surrender.

I, _____, sheriff of the county of _____, hereby certify that Y. Z., the principal mentioned in the within undertaking, was surrendered to me by C. D. and E. F., his sureties, this _____ day of _____, 18____, and is now in my custody.

(*Signature of Sheriff.*)

Where the above certificate is not indorsed upon the undertaking, it may be in the following form:

(*Title of cause.*)

I, _____, sheriff of the county of _____, hereby certify that Y. Z., the defendant in this action, and who is the principal referred to in the annexed undertaking, was surrendered to me by C. D. and E. F., his sureties, this _____ day of _____, 18____, and is now in my custody.

(*Signature of Sheriff.*)

d. Exoneration of bail by judge. Upon the production of a copy of the undertaking and of the sheriff's certificate, together with proof of the due service of the notice on the plaintiff of the certificate of surrender, a judge of the court or a county judge may order the bail to be exonerated, and, on the filing of the order and the papers used on the application, they are exonerated accordingly. Code, § 188. But these provisions of the Code do not apply to an arrest for causes mentioned in subdivision 3 of section 179, so as to discharge the bail from an undertaking given under the provisions of section 211. Code, § 188.

Notice of Motion to Exonerate Bail.

(*Title of cause.*)

Take notice, that on the certificate (or affidavit) with a copy of which you are herewith served, and on the undertaking of bail in this action, I shall move before Hon. _____, one of the justices of this court, at his office in the city of _____, on the _____ day of _____ next, at _____ o'clock in the forenoon, for an order exonerating C. D. and E. F., the bail of the defendant

Affidavit to move for exoneration of bail.

in this action, from all further liability as such bail, and for such other relief as may be just.

Yours, etc.,

A. MILLS,
Defendant's Attorney.

To J. S. AVERY, Esq.,
Plaintiff's Attorney.

Affidavit to move for Exoneration of Bail.

(*Title of cause.*)

C. D., one of the bail (or C. D. and E. F., the bail) for the defendant Y. Z., in this action, being sworn, says (or being sworn do severally say), that judgment was obtained and docketed in this action against the said Y. Z., on or about the day of , 18 , and that an execution in due form was duly issued thereon on the day of , 18 .

II. That (after the issuing, and before the return of the said execution, and (on or about the day of , 18 , the said defendant died at .

(*Jurat.*)

(*Signature.*)

Order Exonerating Bail.

(*Title of cause.*)

On reading and filing the annexed certificate of the sheriff of , (or affidavit of C. D. and E. F.) and a copy of the undertaking of bail given by (the said) C. D. and E. F. in this action, and on motion of A. Mills, counsel for the defendant, and after hearing J. S. Avery, counsel for the plaintiff (or on proof of due service of the notice of this motion on the plaintiff).

ORDERED: That C. D. and E. F., the said bail, be and the same are hereby exonerated from all liability on account of the said undertaking.

(*Date.*)

(*Signature of the Judge.*)

e. Exoneration by death, etc. The bail may be exonerated either by the death of the defendant, or his imprisonment in a State prison, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested. Code, § 191.

It is not absolutely necessary that the bail should in all cases be able to produce positive proof of the death of their principal, when an order of exoneration is sought on that ground. It will be sufficient if the bail establish strong presumptive proof of the death of their principal. What facts will create a presumption of law in favor of the death of a party can only be determined by the peculiar circumstances of each case. Whenever such

Exoneration by death, etc.

presumption is established, the bail may obtain their discharge as well as on positive proof of the death of their principal. *Merritt v. Thompson*, 1 Hilt. 550.

The practice of discharging the bail in cases where the principal was imprisoned for a long series of years in a State prison, existed before the Code. But this practice was never extended to cases where the term of imprisonment was comparatively short. *Cathcart v. Cannon*, 1 Johns. Cas. 28; *Phoenix Fire Insurance Company v. Mowatt*, 6 Cow. 599; *Loftin v. Fowler*, 18 Johns. 335.

The third event mentioned by the Code, as operating to discharge the bail from liability on their undertaking, is the legal discharge of the principal from the obligation to render himself amenable to the process that may be issued against him. This may occur when the principal has obtained a legal discharge from his debts under the insolvent debtors' act, or where he has recovered *final* judgment in the action in which he was arrested. In the latter case the power of the court over the litigation and the parties must be exhausted by such judgment before the liability of the bail ceases. A judgment by default may be a final judgment, and where the bail desire to relieve themselves on such default from further liability on their undertaking, they should move promptly for an order of exoneration; for, if the judgment is set aside before such order is obtained, and the plaintiff be allowed to proceed in the action, their liability will revive. *Von Gerhard v. Lighte*, 13 Abb. 101; *Appleby v. Robinson*, 44 Barb. 316.

And an agreement by a creditor, if not under seal, to accept in discharge of his claim less than the full amount due, is void for want of consideration. An agreement so made between the plaintiff and the defendant under arrest will not exonerate the bail. *Von Gerhard v. Lighte*, 13 Abb. 101. But where the plaintiff does an act to the injury of the bail, or varies the terms of the obligation, or enlarges the time of performance without the consent of the bail, they will be discharged. *Rathbone v. Warren*, 10 Johns. 587; *Huffman v. Hulbert*, 18 Wend. 377.

An exoneretur will be granted on motion where the principal has been discharged under the insolvent debtor's act. *Seaman v. Drake*, 1 Cai. 9; *Franklin v. Thurber*, 1 Cow. 427; *White v. Blake*, 22 Wend. 612. But if the discharge was obtained in time to

Exoneration, at what time.

be pleaded by the principal, a motion for an exoneretur will be denied, unless such plea was interposed. The remedy for the bail in such case is by a surrender of their principal. *Campbell v. Palmer*, 8 Cow. 596; *Post v. Riley*, 18 Johns. 54; *Mechanics' Bank v. Hazard*, 9 id. 392.

The fourth event by which the bail may be exonerated is the execution of the obligation contained in the undertaking by the surrender of their principal to the sheriff of the county in which he was arrested, within twenty days after the commencement of an action against them for the recovery of the sum specified in the undertaking, or within such further time as may be granted by the court.

Previous to the motion for an order of exoneration, the bail should provide themselves with the requisite proof of the facts upon which they rely to obtain the order. If the motion is based on the surrender of the principal, the sheriff's certificate of this fact is the proper proof; if the death of their principal is the foundation of the motion, proper affidavits establishing that fact, or furnishing presumptive evidence to sustain it, should be carefully prepared to be used on the motion. The proof of the other events on which an exoneretur may be ordered, may be furnished by a certified copy of the records of the court, where the proceedings were had on which the bail rely for their exoneration. This proof, whether it be in the form of a sheriff's certificate, an affidavit, or a copy of a record, must be served on the plaintiff, together with the notice of motion, at least eight days before the argument. Code, § 188. An affidavit, or other proof of such service, must be furnished on the argument, together with the papers served and copy of the undertaking.

f. Exoneration, at what time. Where the bail surrender their principal before failing to comply with their obligation, an order of exoneration may be obtained at the expiration of the eight days required for the due service of the notice of motion and certificate of surrender. Code, § 188. But, after an action has been commenced against the bail, no order can be obtained under the Code, unless some one of the events specified in section 191 has occurred within the twenty days next succeeding the commencement of the action, or within such further time as has been allowed by the court. *Hayes v. Carrington*, 12 Abb. 179; *S. C.*, 21 How. 143; *Baker v. Curtis*, 10 Abb. 279.

The same rule holds true if the provisions of the Revised

Extension of time—Notice of motion to extend time to surrender.

Statutes, allowing exoneration on the death of the principal, if occurring within eight days after the return of process, have not been repealed by the Code. But, as there is no longer a return of process in the sense in which it was then understood, the equivalent for such return under the Code must be taken as the limit within which the bail must surrender their principal, as the defendant is entitled to that time to put himself in court to surrender or defend. This equivalent is to be found in the time allowed to answer the complaint after the service of a summons, or where a complaint is not served in the twenty days allowed for an appearance. *Hayes v. Carrington*, 12 Abb. 179; S. C., 21 How. 143; 2 R. S. 383 (397), § 34.

g. Extension of time. The court may, in its discretion, extend the time allowed by the Code for the surrender of their principal by the bail, after the twenty days allowed for such surrender has expired. Code, § 191; *Bank of Geneva v. Reynolds*, 12 Abb. 81; S. C., 20 How. 18; *Gilbert v. Bulkley*, 1 Duer, 668; *Baker v. Curtis*, 10 Abb. 279; *Hayes v. Carrington*, 12 id. 179; S. C., 21 How. 143.

Notice of Motion to Extend time to Surrender.

(*Title of cause.*)

Please take notice, that on the affidavit of which a copy is herewith served, and on the undertaking of bail in this action, I shall move before Hon. _____, one of the justices of the court, at his office, in the city of _____, on the _____ day of _____, 18____, at _____ o'clock in the forenoon, for an order that C. D. and E. F., the defendant's bail in this action, have _____ days further time to surrender such defendant to the sheriff in their exoneration, and for such other relief as may be just.

(*Date.*)

To J. S. AVERY,

Plaintiff's Attorney.

A. MILLS,

Defendant's Attorney.

Affidavit in Support of such Motion.

(*Title of cause.*)

(*Venue.*)

C. D., being duly sworn, says:

I. That he is one of the bail for the above-named defendant, Y. Z., in this action; that said Y. Z. was arrested about the day of _____, 18____, by virtue of an order of arrest granted in said action by the Hon. _____, one of the justices of this court, on the ground that (*state grounds of arrest*) and that on the _____ day of _____, 18____, this deponent and E. F. became bail for this defendant by giving an undertaking, of which a copy is hereto annexed.

Affidavit in support of motion — Bail, how proceeded against.

II. That (*state excuse for not surrendering the defendant in season*).

III. That (*show that a surrender is now possible*).

IV. That no action has been commenced against said bail as deponent is informed and believes. C. D.

(*Jurat.*)

If an action has been commenced against the bail, the motion to enlarge the time in which they may surrender their principal should be made and entitled in such new action. The affidavit should contain, substantially, the same allegations as the one above given, except that it should allege the fact of the commencement of an action against the bail upon their liability upon the undertaking, and also allege their readiness to pay the costs which have already accrued in such action.

The power of extending the time in which the bail may surrender their principal is not confined to the court in which the original action was brought. In a suit brought in the supreme court on an undertaking of bail, that court may grant relief to the bail, although the original action was in another court; and may allow them a temporary stay of proceedings to enable them to surrender their principal. *Barker v. Russell*, 11 Barb. 303; S. C., 1 Code R. N. S. 57.

The practice was well settled before the Code, and has not since been changed, that where bail, by reason of circumstances over which they had no control, were prevented from making the surrender within the regular time, the court would enlarge the time of surrender, although no application had been made, or stay of proceedings obtained within the regular time for making the surrender. *Bank of Geneva v. Reynolds*, 12 Abb. 81; S. C., 20 How. 18, and cases cited.

But an application for an extension of time should state that the bail are in no way indemnified; and where this cannot be shown the application should be denied. *Ib.*

Section 4. Bail, how proceeded against.

a. In general. Under the former practice the plaintiff had his election, on the failure of the bail, to comply with their undertaking, to proceed by *scire facias* on the judgment, or by an action of debt on the recognizance. See 2 R. S. 383 (397), § 35; *id.* 580 (601), § 23. But the Code expressly provides, that in case of failure to comply with the undertaking, the bail may be proceeded against by action only. Code, § 190. This provision

Bail, how proceeded against.

was no doubt intended to abolish the proceeding by *scire facias* and leave only the action on the undertaking. The provisions of the Revised Statutes, in respect to the proceedings necessary to fix the liability of bail on the undertaking, are still in force and are in substance applicable to any right of action upon any undertaking provided for by section 187 of the Code. But, as the form of an action of debt on the recognizance no longer exists, the plaintiff is required to set forth in his complaint every fact which he must prove to enable him to maintain his suit, and which the defendant has a right to controvert in his answer. Thus, as the statute provides that "the plaintiff in the action shall not be entitled to bring any suit on the recognizance of bail, until, 1st, an execution against the property of the defendant shall have been issued to the sheriff of the county in which such defendant was originally arrested, and the same shall have been returned by such sheriff unsatisfied in whole or in part; and, 2d, an execution against the body of the defendant, having at least fifteen days between the teste and return thereof, shall have been issued to the same sheriff and by him returned that the defendant cannot be found within his county," it is still necessary to allege in the complaint in an action on the undertaking, the fact of the issuing of the execution against the property of the defendant and its return unsatisfied, and the issuing of the execution against the body of the defendant and the return that the defendant cannot be found. *Gauntley v. Wheeler*, 31 How. 137; *Pearsall v. Lawrence*, 3 Johns. 514. See 2 R. S. 382 (397), § 31.

The bail may plead as a defense to an action on the undertaking, that executions against the property and against the body of the defendant in the original suit were not issued in accordance with the directions of the statute; or that they were not issued in sufficient time to enable the sheriff to execute the same; or that directions were given by the plaintiff or his attorney to prevent the service of one or both writs; or that any other fraudulent or collusive means were used to prevent such service. If the bail can establish any such defense, they will be entitled to a verdict. 2 R. S. 382 (397), § 33. But the bail cannot plead as a defense an irregularity in the process upon which the arrest was made. The liability of the principal to arrest is conceded by the bail, by entering into the bond. The right to object to an irregularity in the process belongs to the principal alone, and the fact of his giving bail to obtain his discharge is evidence of a

 Bail, how proceeded against — Assignment of bail-bond.

waiver of that right. *Kelley v. McCormick*, 28 N. Y. (1 Tiff.) 318, 320; *Stever v. Somberger*, 19 Wend. 121; S. C., 24 id. 275; *Gregory v. Levy*, 12 Barb. 610; S. C., 7 How. 37. The sheriff, when proceeded against as bail, is in the same manner precluded from objecting that the order of arrest was improperly granted, or that the judgment or execution is irregular. *Bensel v. Lynch*, 44 N. Y. (5 Hand) 162.

The remedy of the bail in such cases is to surrender their principal, and move for an order of exoneration. *Ib.*; *Gregory v. Levy*, 12 Barb. 610; S. C., 7 How. 37.

Bail cannot set up as a defense, in an action on an undertaking, any irregularity in the practice and proceedings in the original action in which they became sureties. If the judgment was irregularly obtained, their remedy was to move promptly to set aside the judgment, and be allowed to come and defend in the original action. *Jewett v. Crane*, 35 Barb. 208; S. C., 13 Abb. 97.

But the bail may set up as a defense any matter showing an agreement between the plaintiff and their principal, made without their knowledge or consent, whereby the relations existing between the parties were materially changed, and the liability and risk of the sureties increased. *Niblo v. Clark*, 3 Wend. 24; S. C. affirmed, 6 id. 236.

The fact that, before judgment in the original action, the debtor was utterly insolvent, and has been so ever since, will not avail as a bar to an action against the bail on their undertaking, nor can it be pleaded in mitigation of damages. *Levy v. Nicholas*, 19 Abb. 282; S. C., 1 Rob. 614; *Bensel v. Lynch*, 44 N. Y. (5 Hand) 162. When there are several defendants liable to imprisonment in satisfaction of a debt, the plaintiff has a right to take the persons of all the defendants in satisfaction of his judgment, and this carries with it the right to proceed against the bail of one as to whom there may be a return of *non est inventus*. *Penn v. Remsen*, 24 How. 503.

Assignment of Bail-bond.

I _____, sheriff of the county of _____, hereby assign the within undertaking of bail to A. B., the plaintiff within named, at his request, according to the statute. In witness whereof, I have hereunto set my hand and seal this _____ day of _____, one thousand eight hundred and _____.

Sealed and delivered in }
the presence of }

E. F.

(Signature of Sheriff).

Delivery of order of arrest to plaintiff—Return by a sheriff, coroner or elisor.

Section 5. Delivery of order of arrest to plaintiff.

a. In general. The order of arrest must specify a time for its return to the plaintiff or attorney by whom it is subscribed or indorsed. Code, § 183. But if the order directs the sheriff to forthwith arrest the defendant and to return the order within five days after the arrest, it will sufficiently specify the time of the return to comply with the requirements of the statute. *Continental Bank v. De Mott*, 8 Bosw. 696. Within the time limited for that purpose the sheriff must execute this order by delivering the order of arrest to such plaintiff, or his attorney, with his return indorsed upon it. Code, § 192.

Section 6. Return by a sheriff, coroner or elisor.

a. Return, how made. The return of an order of arrest is effected by the sheriff's indorsing on the order a short certificate signed by him, stating the manner in which the order was executed. If the sheriff has not been able to find the defendant, he will indorse on the order "*not found*." If he has taken the defendant and discharged him on bail, the usual form of the return is "defendant taken," and the requisite information concerning the bail is contained in a certified copy of the undertaking. If no bail has been given, the return will simply state the fact, as "defendant taken and in custody," or "imprisoned for want of bail."

If the defendant has been rescued, or delivered over on a writ of *habeas corpus*, the return should briefly state the facts. The return is usually in an abbreviated form as before given, but may be expressed at length. The form is immaterial so far as it conveys a correct statement of facts. *Patterson v. Parker*, 2 Hill, 598; *Byrne v. Morris*, 2 Cow. 472. The return of a coroner or elisor is made in the same manner, and, in general, the rules of practice applicable to sheriffs applies to other officers performing the same duties. Code, § 419. A return made by a deputy should in all cases be in the name of his principal; as a return made by a deputy in his own name, as deputy, is not a return by the sheriff, and is not an official act. *Simonds v. Catlin*, 2 Caines, 61.

Return of Arrest.

(*Venue.*)

I have taken and arrested the within named Y. Z. as required by the within order.

(Signature.)
 Sheriff of _____ county.

Enforcing return — Controverting return — Certified copy of undertaking of bail.

Return where no bail is given.

(As above and add) who remains imprisoned in the common jail of _____ county, in my custody, for want of bail.

(Signature, etc.)

Return of not found.

(Venue.)

The within named Y. Z. is not found in my county.

(Signature.)

Sheriff of _____ county.

Return of Arrest, and Deposit in lieu of Bail.

(Venue.)

I have taken and arrested the within-named Y. Z., as required by the within order, and he has deposited with me _____ dollars in lieu and instead of bail in the above-entitled action.

(Signature.)

Sheriff of _____ county.

b. Enforcing return. If the sheriff neglects to obey the terms of the order, and to make his return within the time specified therein, the plaintiff should proceed to compel a return as provided in rule 10, supreme court, by serving on him a notice to return the order within ten days, or show cause at a special term designated in the notice, why an attachment should not issue against him. See *Wilson v. Wright*, 9 How. 459.

c. Controverting return. The return of the sheriff, although false in fact, cannot be questioned collaterally. A return that a defendant cannot be found in the county, fixes the bail, and cannot be questioned by them in an action against them upon their undertaking, although in fact the defendant had been arrested and negligently permitted to escape. The remedy of the bail in such cases is by action directly against the sheriff for a false return, wherein the return may be controverted and its falsity established as a mere question of fact. *McArthur v. Pease*, 46 Barb. 423; *Bradley v. Bishop*, 7 Wend. 352; *Bishop v. Earl*, 17 id. 316; *Boomer v. Laine*, 10 id. 525.

d. Certified copy of the undertaking of bail. It is the duty of the sheriff to deliver to the plaintiff or his attorney, with the order of arrest, a certified copy of the undertaking of the defendant's bail. Code, § 192. The object of this requirement of the Code is to enable the plaintiff to inquire into the solvency of the parties who volunteer to become responsible for the appear-

 Proceedings on justification of bail.

ance of the defendant, and, if such parties are irresponsible, to provide for his safety by requiring the substitution of other bail.

Section 7. Proceedings on justification of bail.

a. Notice to sheriff of non-acceptance of bail. If the plaintiff elects to require further security, he should serve a written notice upon the sheriff that he does not accept the bail. This must be done within ten days from the time of the return and the receipt of the copy of the undertaking, or the plaintiff will be deemed to have accepted the bail, and the sheriff will be exonerated from all liability. Code, § 192. Further time to except to the bail may be obtained after the expiration of the ten days, but it will be only on condition that the liability of the sheriff shall not be revived thereby. *Zimm v. Ritterman*, 5 Rob. 618. See *Cohn v. Davis*, 1 H. Bla. 80; *Rogers v. Mapleback*, id. 106.

Notice of Exception to Bail.

(Title of cause.)

SIR: Please take notice that the plaintiff does not accept the bail offered by the defendant in this action. Yours, etc.,

(Dated.) JOHN McCARTIN, Plaintiff's Attorney.
To the sheriff of the county of

b. Notice of justification given to plaintiff's attorney. On the receipt of such notice, the sheriff or defendant may, within the ten days following, give notice to the plaintiff or attorney by whom the order of arrest is subscribed, of the justification of the same or other bail. If new bail are substituted in the place of those excepted to, the notice must specify their places of residence and occupation. Code, § 193; *Anonymous*, 1 Chitty, 292. It must state before what judge, at what time, and in what place, the bail will justify. Code, § 193. See *Colman v. Roberts*, 1 Chitty, 88; *Smith v. Mellon*, 5 Taunt. 854.

Notice of Bail's Justifying.

(Title of cause.)

SIR: Take notice that the same bail heretofore proposed by the defendant in this action will justify before the Hon. , at his office, in the city of , on the day of next, at o'clock in the forenoon. Yours, etc.,

WYNNE & PORTER, Defendant's Attorneys.

Or, J. J. C., Sheriff of , county of

(Dated.)

To JOHN McCARTIN,
Plaintiff's Attorney.

Time, place and mode of justification.

c. Time, place and mode of justification. The bail must justify before a judge of the court or a county judge. Prior to the amendment of the Code in 1851, bail might justify before a justice of the peace, as well as before a judge of a court of record. But, by that amendment, the words "justice of the peace" were stricken out of section 193, although retained by evident inadvertence in the three succeeding sections. The place of justification must be within the county where the defendant was arrested, or where the bail reside. Rule 8, Supreme Court. The time must be not less than five nor more than ten days after the service of the notice on the plaintiff. Code, § 193. But, if the sureties in the undertaking do not justify at the time specified in the notice, further time may be allowed on good cause shown. *Burns v. Robbins*, 1 Code R. 62; *West's Bail*, 1 Chitty, 192; *Hamilton v. Dainsford*, 2 id. 82. Each of the bail should attend before the judge at the time and place specified in the notice, in order that the plaintiff may examine him touching his sufficiency. The examination is intended to satisfy the judge that the persons offering themselves as bail possess the requisite qualifications, and the examination is conducted in such a manner as he, in his discretion, may think proper. Code, § 195.

The examination may be on oath, and it must be reduced to writing and subscribed by the bail when required by the plaintiff's attorney. Usually, the attorney for the defendant attends with properly verified affidavits of the sufficiency of the bail, or with affidavits ready for verification before the judge. If no one appears on the part of the plaintiff, the judge usually allows the bail on the affidavits and proofs presented. It is not the duty of the judge or justice before whom the justification is to be had, to enter upon any examination as to their sufficiency, unless required to do so by the plaintiff, or some one in his behalf. The words of the statute are permissive merely, and provide that the bail *may* be examined on oath. To avail himself of this provision, the plaintiff or his attorney must be in attendance before the judge when the bail appear, or he must necessarily lose the benefit of his exception. And, even where the bail fail to attend before the judge, this rule of waiver will apply, and no further justification will be necessary. *Ballard v. Ballard*, 18 N. Y. (4 Smith) 491. The effect of a failure of the plaintiff or his attorney to attend before the officer, is to leave the bail in

Affidavit for further time to justify.

the situation in which they were before the notice of exception was served, and to discharge the sheriff from liability.

But, where the plaintiff appears in person or by attorney, the affidavits of the bail in respect to their sufficiency are used as the basis on which he conducts his examination. This is in the nature of a cross-examination, to which the affidavits form the evidence in chief. The objections usually raised on such examinations relate to the supposed disqualifications of the bail, from whatever cause they may arise. These disqualifications will be discussed in a subsequent section.

Affidavit for further time to justify.

(Title of cause.)

(Venue.)

C. F., being duly sworn, says :

I. That he is the attorney for the defendant in the above-entitled action.

II. That E. F., one of the sureties proposed by said defendant as his bail in this action, and whose name is mentioned in the notice of jurisdiction hereto annexed, promised and consented to become bail in this action for the said defendant, and has executed the required undertaking of bail. That he promised to attend this morning at o'clock before the Hon. , at his office in the city of , to justify as such bail. And deponent verily believes that the said E. F. was and is able to justify as good and sufficient bail in this action.

III. That this deponent fully expected that the said E. F. would have attended at the time specified to justify in accordance with the promises heretofore mentioned, but that he has not appeared for that purpose to the knowledge of this deponent. That this deponent has no knowledge of the cause of the absence of the said E. F., and is at present unable to account for the same.

IV. That deponent fully expects and believes that he will be able to produce the said E. F. for such justification on the day of , next, before the Hon. , at his office in the city of , (or if the defendant wishes to substitute new bail in place of those named, omit the last allegation and continue as follows.)

IV. That this deponent, as attorney for the defendant, will propose, and desires further time to justify as bail instead of E. F., O. K., , a resident of , in said county, who, as this deponent believes, is able to justify as good and sufficient bail in this action.

(Jurat.)

(Signature.)

Order extending time to justify — Examination of bail — New bail.

Order Extending Time to Justify.

(Title of cause.)

Upon reading and filing the affidavit of C. F. herein, it is
ORDERED: That the defendant have days further time to
justify O. K. as bail for the said defendant, in the stead of E. F.

(Date.)

(Judge's Signature.)

Examination of Bail.

(Title of cause.)

On this day of , 18 , before the undersigned
 , a justice of this court (or county judge of the
county of), personally appeared C. D. and E. F., the
bail of the defendant Y. Z. in this action, to justify pursuant to
notice; and the said C. D., being duly sworn, says (*here state*
the testimony of C. D., as to his sufficiency, etc., inserting, if
desired, the questions and answers in form.)

And the said E. F., being duly sworn, says (*etc., as above*).

(Signature of Bail.)

Taken and sworn before me the day first above written.

(Judge's signature and official title.)

d. New bail. Where, after notice by the plaintiff of exception to the bail, the sheriff or the defendant serve a notice of the justification of new bail, the exception to the original bail will be deemed to extend to the bail so substituted, and they will be required to justify. A new undertaking must also be given in the form prescribed in section 187. Code, § 193.

Notice of Justification of other Bail.

(Title of cause.)

Take notice, That O. P., _____, and R. S., _____, both residents of the city of _____, in the county of _____, who are proposed as bail in the place of C. D. and E. F., the bail already offered, will justify before the Hon. _____, one of the justices of this court (or county judge of the county of _____), at his office in the city of _____, on the _____ day of _____ next, at _____ o'clock in the forenoon.

Yours, etc.,

(Signature of Defendant's Attorney or of Sheriff.)

(Date.)

(*Address.*)

Section 8. Qualifications of bail.

a. In general. The Code prescribes that the qualifications of bail shall be substantially as follows :

 Qualifications and disqualifications of bail — Allowance of bail.

1. Each of them must be a resident and householder, or freeholder, within the State.

2. Where only two justify as bail, each must be worth the amount specified in the order of arrest, exclusive of property exempt from execution. But the judge may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail. Code, § 194. Under the old practice, the qualifications of bail were essentially different from those now existing under the Code, and many of the old rules relating thereto will not now apply.

b. Disqualification of bail. But the common law disqualifications of bail are still unchanged by the Code. *Miles v. Clarke*, 2 Bosw. 709; S. C. affirmed, 4 id. 632; *Wheeler v. Wilcox*, 7 Abb. 73.

As a general rule, the court will not allow bail to justify, even when unopposed, where in a previous examination the court has been satisfied that such bail were unfit. *Laporte's Bail*, 3 Dowl. P. C. 110. Attorneys were disqualified at common law, and now by an express rule of the courts they are so disqualified under the Code. Rule 8, Supreme Court. As a general rule, all officers of courts are disqualified as bail. *Payne v. Fry*, 1 Stra. 546; *Dutton v. Welstead*, 2 Chitty, 77. The same rule applies to any one in any way concerned with the process of the courts. *Bailey v. Warden*, 20 Johns. 129. An insolvent debtor is also disqualified as bail. *Curtis v. Smith*, 1 Chitty, 116. So also are persons whose character is so infamous as to disqualify them as witnesses. *Rex v. Edwards*, 4 Term R. 440. And persons generally, whose statements are evasive, uncertain or unsatisfactory on the examination, will be rejected as bail. *Newman's Bail*, 2 Chitty, 95; *Bennet's Bail*, 1 id. 289; *Probst's Bail*, id. 288; Lofft. 72, 194.

c. Allowance of bail. If on the examination of the bail the judge is satisfied that they possess the requisite qualifications, he should annex the examination to the undertaking, indorse his allowance thereon, and cause it to be filed with the clerk. Code, § 196. The sheriff's discharge from liability as bail is then absolute. And should the sureties afterward become insolvent the justification cannot be opened, or additional sureties ordered. *Dudley v. Goodrich*, 16 How. 189; S. C., 7 Abb. 26; *Hartford Quarry Company v. Pendleton*, 4 id. 460; *Willett v. Stringer*,

 Allowance of bail.

15 How. 310; S. C., 6 Duer, 686. But, before any bond or undertaking can be received or filed, it should be duly proved or acknowledged in like manner as deeds of real estate. Rule 9, Supreme Court. But, if the undertaking is not so acknowledged, the defect can be supplied by subsequent acknowledgment, and the court will generally permit this to be done on terms. *Conklin v. Dutcher*, 5 How. 386; S. C., 1 Code R. N. S. 49. But it must be remembered that a failure to comply with the requirements of the statute is a more serious defect, and should be carefully avoided, and that, until the judge has indorsed his allowance on the undertaking and caused it to be filed with the clerk, the bail is not perfected, and the sheriff is still liable. *O'Neil v. Durkee*, 12 How. 94; S. C., sub nom. *Overill v. Durkee*, 2 Abb. 383.

Allowance of Bail.

This day appeared before me, the within-named C. D. and E. F., bail for the defendant Y. Z. in this action, and justified as such, and I find said bail to be sufficient and allow the same.

(Date.)

(Signature of Judge).

Allowance as to one; Further time to Justify as to the other.

(Omit one name from the above, and add) and, upon reading and filing the annexed affidavit of _____, it is further ordered that the defendant have _____ days further time to justify E. F., his other bail in this cause; the defendant hereby consenting that the plaintiff shall be in the same situation by the course of this court, as if they had both justified this day.

(Date).

(Signature of Judge).

Allowance and Direction that Money be Refunded.

(As above and add). And it is further ordered, that the sum of _____ dollars deposited in the hands of the sheriff of the county of _____, by the defendant on his arrest in this cause, instead of bail, and since brought into court by the sheriff pursuant to the statute, be paid out of court to the defendant or his attorney by the clerk.

(Date.)

(Signature of Judge.)

Allowance of Added Bail.

(Title of cause.)

Upon reading and filing the affidavit of _____ (or when the bail is added by a new undertaking and notice of justification, say,) the within undertaking of C. D., as bail and the annexed

Jail liberties.

notice of bail and justification and proof of service thereof), and the said C. D., having appeared before me and justified as such, I find such bail to be sufficient, and allow the same, together with E. F., who justified himself on the day of last.
 (Date.) • (Signature of Judge.)

d. Jail liberties. If the defendant fail to procure bail, or if the bail fail to justify, or if they justify and afterward surrender their principal, the defendant will be in the custody of the sheriff, and may be at once committed to the county jail. But, on executing the proper bond to the sheriff, as required by the Revised Statutes, he will be entitled to be admitted to the liberties of the jail which have been established in such county according to law.

Such bond must be executed by the prisoner, and one or more sufficient sureties, being inhabitants and householders of the county, in a penalty not less than double the amount of the sum in which the sheriff was required to hold the defendant to bail.

Such bond must be conditioned, that the person so in custody of such sheriff shall remain a true and faithful prisoner, and shall not at any time, or in any manner, escape or go without the limits and boundaries of the liberties established for the jail of such county, until discharged by due course of law.

This bond will be valid, and may be held by the sheriff for his indemnity and that of the party at whose suit the prisoner was arrested.

If the sheriff discover at any time that any surety to such bond is insufficient, he may commit the prisoner to close confinement until other good and sufficient sureties shall be offered. 2 R. S. 434 (453), §§ 41, 44.

The statutes also provide for the surrender of their principal by the sureties, and for the arrest of such principal when going at large beyond the jail liberties, without the consent of the plaintiff in the suit in which the prisoner was arrested. *Id.*, §§ 45, 46.

The sheriff alone is judge of the sufficiency of the bond taken by him for his indemnity, and the courts cannot require him to accept the bond of any sureties which he shall deem insufficient. *Sartos v. Merceques*, 9 How. 188. But, if the conditions of the bond do not conform substantially to the terms of the statute, it will be void. *Sullivan v. Alexander*, 19 Johns. 233.

Bond for jail liberties — Requirement of bail to jail keeper.

Bond for Jail Liberties.

Know all men by these presents that we, Y. Z., M. N., of _____, and O. K. of _____, county of _____, State of New York, are held and firmly bound unto _____, sheriff of the county of _____, in the sum of _____ dollars, to be paid to the said _____, his executors, administrators and assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, firmly by these presents. Sealed with our seals, and dated the _____ day of _____, 18 ____.

Whereas, The above bounden Y. Z. is now in custody of the above-named sheriff, by virtue of an order of arrest granted by the Hon. _____, one of the justices of the supreme court, at the complaint of A. B., on the _____ day of _____ last, which order directs the defendant to be held to bail in the sum of _____ dollars.

Now, therefore, the condition of this obligation is such that if the above-bounden Y. Z. shall remain a true and faithful prisoner in custody as aforesaid, and shall not at any time, nor under any circumstances, go without the limits of the jail liberties as established for the jail of said county of _____, until discharged by due course of law, then this obligation to be void; otherwise to remain in full force and virtue.

(Signatures and Seals.)

Sealed and delivered in presence of

A. B.

(Add Justification and Acknowledgment.)

Requirement of Bail to Jail Keeper.

To _____, keeper of the jail in and for the county of _____:

We, M. N. and O. K., sureties in a certain bond executed by us, together with Y. Z. to _____, sheriff of the county of _____, bearing date on the _____ day of _____, 18 ____, for the purpose of obtaining for said Y. Z., then in custody of said sheriff, the jail liberties of said county, hereby require you to take said Y. Z. into your custody and to indorse upon the said bond an acknowledgment of the surrender of the said Y. Z. And we also require you to give us a certificate acknowledging such surrender.

(Date.)

(Signatures.)

Certificate of Surrender.

I, _____, keeper of the jail in and for the county of _____, hereby certify that M. N. and O. K. of said county, sureties in a certain bail bond executed by them with Y. Z. on the _____ day of _____ last, to _____, sheriff of the county of _____, for the purpose of obtaining for said Y. Z. the jail liberties of said county, have this day surrendered said Y. Z. into my custody, in exoneration of themselves as sureties in said bond. And I further certify that an acknowledgment of such surrender has been by me duly indorsed on said bond according to the statute.

(Date.)

(Signature.)

Deposit in lieu of bail.

Section 9. Deposit in lieu of bail.

a. How made. The defendant may at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order, and be thereupon discharged out of custody. It is the duty of the sheriff to give him a receipt for the money so received. Code, § 197.

Certificate of Deposit in Lieu of Bail.

(Title of cause.)

This is to certify that I have received from Y. Z., the above-named defendant, the sum of dollars, as a deposit in lieu of bail, being the amount mentioned in the order of arrest in this action.

(Date.)

(Signature of Sheriff.)

b. Payment of deposit into court by sheriff. Within four days after the deposit, the sheriff must pay the same into court, taking from the officer receiving the same two certificates of such payment. One of these certificates must be delivered to the plaintiff and the other to the defendant. Should the sheriff make any default in this payment, the party aggrieved has a remedy in an action on the official bond of the sheriff for the collection of the money so deposited. Code, § 198. But the money, if deposited by the defendant in lieu of giving bail, will be at the risk of the depositor, and if it be stolen or lost without any fault on the part of the plaintiff, the defendant must bear the loss. *Parsons v. Travis*, 5 Duer, 650.

Certificate by Clerk.

(Title of cause.)

I hereby certify that , sheriff of the county of , has this day paid into court the sum of dollars, being the amount mentioned in the order of arrest in this action.

(Date.)

(Signature of Clerk.)

c. Substituting bail for deposit. Where money has been deposited in this manner, in lieu of bail, the defendant may substitute bail for it, and cause it to be refunded. The defendant should give bail to the sheriff, just as he would, in the first instance, if no deposit had been made. The plaintiff should have an opportunity to except to the sureties, and he has ten days in which to do so after receiving from the sheriff a copy of the undertaking. If no notice of exception is given, the sheriff or de-

Application of deposit if not reclaimed.

defendant should serve a notice of justification as prescribed in section 193. At the time specified in such notice the bail should attend before the judge and justify, and thereupon the judge will direct in the order of allowance that the money deposited be refunded to the defendant by the sheriff. And the money must be refunded accordingly. Code, § 199. This is a substantial right given to the defendant by the express provisions of the Code, and does not depend upon the favor of the court. It may be exercised at any time before judgment. But no application for the refunding of the money can be made until bail has actually justified, and upon notice of not less than five nor more than ten days. *Hermann v. Aaronson*, 3 Abb. N. S. 389; S. C., 34 How. 272; S. C. affirmed, 8 Abb. N. S. 155.

d. Application of deposit if not reclaimed. If the money deposited has not previously been reclaimed by the defendant as provided in the preceding section, it *must* be applied in the satisfaction of any judgment that may be rendered in the action against the defendant, or in satisfaction of any order directing the payment of money to the plaintiff. Code, § 200; *Hermann v. Aaronson*, 8 Abb. N. S. 155; affirming S. C., 3 id. 389; 34 How. 272. The clerk, under the direction of the court, must first satisfy such demands of the plaintiff and refund the surplus, if there be any, to the defendant. But, if the judgment be in favor of the defendant, the clerk must refund to him the whole sum deposited and remaining unapplied. Code, § 200. The court cannot order it to be refunded, to a third person after judgment, even though he in fact deposited it. After judgment it must be treated as belonging to the defendant. *Hermann v. Aaronson*, 8 Abb. N. S. 155.

But this rule applies only to money deposited in lieu of bail. And where a sum of money has been put into the hands of the sheriff who has become bail for a defendant on an order of arrest, to secure the sheriff until such bail shall justify, it is not a deposit in lieu of bail; and, on the entry of judgment before such justification, the plaintiff does not become entitled to the application of the money so deposited on the judgment, under the provisions of section 200 of the Code. *Commercial Warehouse Co. of New York v. Graber*, 2 Sweeny, 638.

Section 10. Sheriff's liability as bail.

a. Where bail do not justify. The sheriff's liability as bail commences immediately upon the arrest of a defendant, and continues until he has discharged himself from such liability by the

Where bail do not justify.

giving and justification of bail as provided in sections 193, 196 ; or until a deposit has been made in lieu of bail as provided in section 199. The privilege of giving and perfecting bail may be claimed by him at any time before process against the person of the defendant, to enforce an order or judgment in the action. Code, § 201. When bail is given the sheriff's liability ceases only when the undertaking bearing the judges approval has been filed with the clerk. *O'Neil v. Durkee*, 12 How. 94 ; S. C., sub nom. *Overill v. Durkee*, 2 Abb. 383. Where the bail given for a defendant are excepted to and fail to justify, and no new bail are given, nor a deposit made, the sheriff himself becomes liable as bail. *Buckman v. Carnley*, 9 How. 180 ; *Decker v. Anderson*, 39 Barb. 346 ; *Sartos v. Merceques*, 9 How. 188 ; *Seaver v. Genner*, 10 Abb. 256. The sheriff has therefore all the rights of bail, and the same rights as though he were the bail and had justified. In the exercise of these rights he may re-arrest his principal without process, and surrender him in his own exoneration, under section 191, within twenty days after action brought against him. *Ib.*

Where the sheriff becomes liable as bail, it must be the kind and character of bail adapted to the action. The plaintiff is entitled to the same security from the sheriff that he would have been entitled to on a written undertaking given by other persons ; and, if the arrest was in an action under subdivision 3 of section 179, the liability of the sheriff will be that specified in section 211. *McKenzie v. Smith*, 27 How. 20. But, to fix this liability, the judgment must be strictly in accordance with the provisions of section 277, viz., for the possession or the recovery of the possession, or for the value of the property in case a recovery cannot be had, and of damages for its detention. The plaintiff is not entitled to waive the claim to the possession and to have an absolute judgment, in damages to the value of the property, and, the sheriff as bail would not be liable on such judgment. *Gallarati v. Orser*, 27 N. Y. (13 Smith) 324 ; *Bensel v. Lynch*, 2 Rob. 448 ; S. C. affirmed, 44 N. Y. (5 Hand) 162.

As a general rule, where the sheriff is liable as bail, that liability is fixed by the original judgment, and the insolvency of such defendant will not constitute any defense to the action. *Bensel v. Lynch*, 2 Rob. 448 ; S. C. affirmed, 44 N. Y. (5 Hand) 163 ; *Metcalf v. Stryker*, 31 Barb. 62 ; 31 N. Y. (4 Tiff.) 255. And should the sheriff elect to pay the amount of such judgment

 Liability on an escape and rescue — Recapture.

while an appeal is pending, he will not thereby be discharged from liability. The amount of such liability will be increased, to the extent of the interest on the original judgment, and the costs of appeal. *Appleby v. Robinson*, 44 Barb. 316. But the entire liability cannot exceed the sum specified in the undertaking of bail. *Ib.*

b. Liability on an escape. The Code in section 201 provides, that if a defendant escape after being arrested on an order of arrest, the sheriff shall be liable *as bail*. The common law gave an action against the sheriff for an escape, which action is recognized by the Code in section 94. These two remedies are distinct, and differ both in the mode of procedure and in the measure of damages under each. The plaintiff has an election which of these remedies he will adopt, and may manifest his election in his pleadings. If the plaintiff proceed against the sheriff on his liability *as bail*, under section 201, the amount of damages recoverable will be measured by the judgment in the original action. No defense setting up the insolvency of his principal can avail the sheriff in an action against him as bail. *Metcalf v. Stryker*, 31 N. Y. (4 Tiff.) 255; *Censel v. Lynch*, 44 id. (5 Hand) 162; *Smith v. Knapp*, 30 id. (3 Tiff.) 581; *Levy v. Nicholas*, 19 Abb. 282; S. C., 1 Rob. 614. But in a common-law action for an escape, the measure of damages would be the loss actually sustained by the plaintiff, by reason of such escape, and the solvency of the defendant might be shown as a bar to the action, or in mitigation of damages. *Ib.*

c. Liability on a rescue. The sheriff is responsible to the plaintiff for the safe keeping of a defendant in custody under an order of arrest, and he is liable as bail, as well where the defendant has been rescued as where he has escaped through the negligence of the sheriff. Code, § 201. In the absence of any reported decisions on this point, it may be a question how far the courts would enforce this liability where the rescue could not reasonably have been anticipated. See *Howden v. Standish*, 6 Mann., Grang. & Sc. 521.

d. Recapture. As has been elsewhere stated, the sheriff is authorized to recapture the defendant, after a negligent escape, or a rescue, at any time, or in any place. *Rigeway's Case*, 3 Coke, 52; *Anonymous*, 6 Mod. 231; *Jones v. Pope*, 1 Saund. 35; *Nichols v. Ingersoll*, 7 Johns. 145; *Lockwood v. Mercereau*, 6 Abb. 206. So the sheriff may recapture the defendant after a

Proceedings on judgment against sheriff—Bail liable to sheriff.

voluntary escape from custody, on an order of arrest, at any time before the return day of the order. *Clark v. Cleveland*, 6 Hill, 349; *Arnold v. Steeves*, 10 Wend. 514. On the recapture of a defendant the sheriff may, within the prescribed time, surrender him in his own exoneration. *Buckman v. Carnley*, 9 How. 180; *Seaver v. Genner*, 10 Abb. 256. And where a defendant escapes from the jail limits, it will be a good defense in an action against the sheriff for such escape, to show that the prisoner was recaptured before the commencement of the action. 2 R. S. 435 (453) § 48.

Section 11. Proceedings on judgment against sheriff.

a. In general. If a judgment be recovered against the sheriff, upon his liability as bail, and an execution thereon be returned unsatisfied, in whole or in part, the same proceedings may be had on the official bond of the sheriff, to collect the deficiency, as in other cases of delinquency. Code, § 202, *People ex rel. Metcalf v. Dikeman*, 4 Keyes, 93. See Actions by and against Sheriffs.

b. Bail liable to sheriff. It is provided by section 203 of the Code, that the bail taken upon arrest, shall, unless they justify, or other bail be given or justified, be liable to the sheriff, by action, for the damages which he may sustain by reason of such omission. This section of the Code gives the sheriff no right of action against the bail until he has sustained damage from the liability as bail which the law imposes upon him. Under the old system, the bail were liable to the sheriff if they failed to put in bail in the action. It was a contract liability. Under the present system, the liability is for the *damages* which the sheriff has sustained by reason of the omission or neglect of the bail to justify. *Clapp v. Schutt*, 29 How. 255; S. C., 44 Barb. 9; 19 Abb. 121; 44 N. Y. (5 Hand) 104. But where the liability of the bail was unlawfully created, as on a bond taken by the sheriff from the defendant and a surety, for the purpose of securing a release from an illegal arrest, the obligation may be avoided by the surety in a several action against him on the ground of duress. *Thompson v. Lockwood*, 15 Johns. 256. See *Webber's Executors v. Blunt*, 19 Wend. 188. See Actions by Sheriffs.

Section 12. Vacating order or reducing bail.

a. At what time. By section 204 of the Code it is provided that a defendant may apply, on motion, to vacate an order of arrest, or to reduce the amount of bail, *at any time before judgment.* This section of the Code must be construed in connection

 Vacating order or reducing bail — General practice on motion.

with section 183, which provides that an order of arrest shall be of no avail, and shall be vacated, or set aside on motion, unless the same is served upon the defendant as provided by law, before the docketing of any judgment in the action, and the defendant shall have *twenty days after the service of the order of arrest* in which to *answer* the complaint in the action, and to move to *vacate* the order of arrest, or to *reduce* the amount of bail.

Construed together, the effect of the two sections is to give the defendant until the rendition of a judgment in which to move to vacate the order of arrest, where such orders were served more than twenty days prior to the rendition of such judgment. But where the arrest was made within the twenty days immediately preceeding judgment, the defendant is allowed to move to vacate the order although after judgment rendered, provided such motion is made within twenty days from the service of the order of arrest. *Pelo v. Clukey*, 36 How. 179.

Prior to the amendment of section 183 of the Code, in 1862, an arrest might be made in the same hour in which judgment was rendered, thus virtually rendering it impossible for the defendant to move to vacate the order, or to reduce the amount of bail, according to the intent of the statute. *Barker v. Wheeler*, 23 How. 193; S. C., 14 Abb. 170. The amendment gave the defendant, in all cases, twenty days in which to move to vacate the order, or to reduce the amount of bail. *Pelo v. Clukey*, 36 How. 179. The amendment of section 204, in 1858, substituted the word "judgment" for "justification of bail," thus rendering of no present force or value numerous reported decisions rendered prior to such amendment. And by the term "judgment," as used in section 204, must be understood the final determination of the rights of the parties in the action, beyond which the court has no jurisdiction over the person of the parties, or of the subject-matter of the action. *Mott v. Union Bank of City of New York*, 38 N. Y. (11 Tiff.) 18; S. C., 35 How. 332; 4 Abb. N. S. 270; 4 Trans. App. 291.

b. General practice on motion. The motion to vacate an order of arrest, or to reduce the amount of bail, may be made *ex parte*, and at chambers, if before the judge who granted the order. But, if made before another judge, the application must be to the court, and on eight days' notice to the plaintiff. *Rogers v. McElhone*, 20 How. 441; S. C., 12 Abb. 292; *Cayuga Bank v.*

Motion on plaintiff's papers.

Warfield, 13 How. 439; *Dunaher v. Meyer*, 1 Code R. 87; Code, §§ 324, 401, 402. In all the districts, a motion to vacate or modify a provisional remedy has preference over all other motions. Code, § 401, subd. 5. When the motion is upon notice, it must be made within the district in which the action is triable, or in the county adjoining that in which it is triable, except that where the action is triable in the first judicial district the motion must be made therein, and no motion upon notice can be made in the first judicial district in an action triable elsewhere. Code, § 401.

c. Motion on plaintiff's papers. The papers upon which a motion to vacate an order of arrest should be based depends mainly upon the cause of action in which the order was granted. Where the right to arrest is founded upon the nature of the action, the defendant will not be required to introduce affidavits to show that there is no cause of action, and to move to set aside the order before judgment; but he may, on the trial, contest the facts relied on as a ground of arrest, and if they are not proved at the trial, no execution can be issued against the person. *Elwood v. Gardner*, 10 Abb. N. S. 238; 45 N. Y. (6 Hand) 349; 5 Albany Law Journal, 307. But when the arrest is founded upon extrinsic facts, wholly independent of the cause of action, the defendant may contest the truth of the facts upon which the arrest was ordered, and if he satisfies the court by his own affidavit or otherwise, that there is no foundation for the arrest, he is entitled to his discharge. *Geller v. Seixas*, 4 Abb. 103; *Royal Ins. Co. v. Noble*, 5 Abb. N. S. 54; *Corwin v. Free-land*, 6 N. Y. (2 Seld.) 565; *Merritt v. Heckscher*, 50 Barb. 451; *Swift v. Wylie*, 5 Rob. 680; *Cheney v. Garbutt*, 5 How. 467; S. C., 1 Code R. N. S. 166; *Brodsky v. Ihms*, 16 Abb. 251; S. C., 25 How. 471; *Baker v. Swackhamer*, 5 id. 251; S. C., 3 Code R. 248; *Nelson v. Blanchfield*, 54 Barb. 680. The defendant may move to vacate the order solely on the ground that the affidavits on which the order was granted were defective or insufficient. In such case the only issue presented will be whether the affidavit authorized the granting of the order. *Martin v. Vanderlip*, 3 How. 265; S. C., 1 Code R. 41. But where the defendant bases his application on the insufficiency of the plaintiff's affidavit, the affidavit being uncontradicted, must be taken as true, but must be construed strictly against the plaintiff. *Hathorn v. Hall*, 4 Abb. 227; *Lovell v. Martin*, 21 How. 238; S. C., 12 Abb.

Notice of motion to vacate an order of arrest.

178; *Wolfe v. Brouwer*, 5 Rob. 601; *Union Bank v. Mott*, 9 Abb. 106; S. C., 17 How. 353.

Where a copy of the complaint has been served, which sets forth a cause of action on which no arrest could be had, joined with a cause of action on which an order of arrest might properly issue, the defendant may move to vacate the order of arrest on the complaint alone. *McGovern v. Payn*, 32 Barb. 83; *Smith v. Knapp*, 30 N. Y. (3 Tiff.) 581; *Miller v. Scherder*, 2 id. (2 Comst.) 262; *Ely v. Steigler*, 9 Abb. N. S. 35; *Lambert v. Snow*, 9 Abb. 91; S. C., 17 How. 517; 2 Hilt. 501; *Brown v. Ashbough*, 40 How. 226. But the mere fact that the demand for judgment contains a prayer for relief inconsistent with the facts stated in the body of the complaint, will not, of itself, authorize an application for an order vacating an arrest. It is the facts stated that determine the character of the action, and not the demand for relief. *Redfield v. Frear*, 9 Abb. N. S. 449.

Notice of Motion to Vacate an Order of Arrest.

(*Title of cause.*)

SIR: Please take notice that on an affidavit, of which the within is a copy (or, of which a copy is annexed), and on all the papers filed and served in this action, the undersigned will move the court at a special term to be held at _____, on the _____ day of _____, 187____, at _____ o'clock in the forenoon, or as soon thereafter as counsel can be heard (or, will move before the Hon. _____, a justice of this court, at his office, in the city of _____, on the _____ day of _____, 187____, at _____ o'clock in the _____ noon), to vacate the order of arrest in this action, upon the ground (*state the ground of the motion*), and for such other or further order as may be just, and for the costs of this motion.

(*Date.*)

(*Signature.*)

(*Address.*)

d. Affidavits on motion. If the motion be made upon affidavits on the part of the defendant, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the order of arrest was made. Code, § 205. But, unless the defendant bases his motion on affidavits, the plaintiff cannot introduce additional affidavits to sustain the arrest. Code, § 205; *Martin v. Vanderlip*, 3 How. 265; S. C., 1 Code R. 41. But where affidavits are introduced by the defendant, on a motion to vacate an order of arrest, the plaintiff may not only introduce other affidavits sustaining the allegations on which the order was

Renewing motion to vacate.

granted, but may prove contemporaneous frauds on the part of the defendant. *Scott v. Williams*, 23 How. 393; S. C., 14 Abb. 70. See *Yates v. North*, 44 N. Y. (5 Hand) 271. But the evidence so introduced must amount to legal evidence, and not mere hearsay. *Stewart v. Potter*, 37 How. 68.

It may be stated as a general rule of practice, that where the evidence presented on a motion to vacate an order of arrest is unsatisfactory and conflicting, the test by which the motion will be determined will be whether, upon the whole case as made by the affidavits on both sides, the court, if called upon to act upon the application as an original motion, would grant the order of arrest. If it would, then the motion to vacate will be denied. But, if upon the whole testimony it appears that an order of arrest could not properly issue, the motion to vacate will be granted. *Chapin v. Seeley*, 13 How. 490; *Union Bank v. Mott*, 6 Abb. 315; *Barron v. Sanford*, 14 How. 443; S. C., 6 Abb. 320, note; *Allen v. McCrasson*, 32 Barb. 662. But, where the affidavits are directly contradictory, and equally credible, the courts will give the defendant the benefit of the doubt, and vacate the order of arrest. *Hernandez v. Carnobeli*, 10 How. 433, 449; S. C., 4 Duer, 642; *Allen v. McCrasson*, 32 Barb. 662; *Republic of Mexico v. Arrangois*, 11 How. 1; S. C., 5 Duer, 634; *Barron v. Sanford*, 14 How. 443; S. C., 6 Abb. 320, note. But see *post*, *f.*

e. Renewing motion to vacate. Where the motion to vacate an order of arrest has been denied, it cannot be renewed without first obtaining leave of the court. *Lovell v. Martin*, 21 How. 238; S. C., 12 Abb. 178. See *Smith v. Coe*, 1 Sweeny, 385; *Hall v. Emmons*, 9 Abb. N. S. 370. This leave to renew a motion ought not to be granted unless a new state of facts can be presented on a subsequent motion. *Smith v. Spalding*, 30 How. 339; S. C., 3 Rob. 615; *Union Bank v. Mott*, 6 Abb. 315. See *White v. Munroe*, 33 Barb. 650; S. C., 12 Abb. 357. It is expressly provided, by rule 31 of the supreme court, that if any application for an order be made to any judge or justice, and such order be refused in whole or in part, or be granted conditionally, or on terms, no subsequent application upon the same state of facts shall be made to any other judge or justice; and if, upon a subsequent application, any order be made, it shall be revoked.

But, although a motion to vacate an order of arrest has been denied, the motion may be renewed on a new state of facts, such

Merits not tried on motion — Motion when granted.

as would be ground for giving leave to renew. *Butts v. Burnett*, 6 Abb. N. S. 302; *Adams v. Bush*, 2 id. 112; *Hall v. Emmons*, 2 Sweeny, 396; S. C., 8 Abb. N. S. 451; 39 How. 187. See *Belmont v. Erie Railway Co.*, 52 Barb. 637; S. C., 6 Abb. N. S. 442.

f. Merits not tried on motion. Before determining how far the merits of an action may be tried on a motion to vacate an order of arrest, a distinction must be made between the cases where the right of action and the right to arrest, are identical, and the other class of actions where a right to arrest is independent of the right of action. In all cases an order of arrest must be based upon an affidavit. But where the right to arrest and the right of action are independent, the question whether the right to arrest exists, can only be determined from the affidavits, and does not form an issue at the trial. In this case, the court must from necessity decide the question. But where the facts constituting the cause of action, and those authorizing the arrest are identical, a jury, upon a trial of the issues, will pass upon them, and the courts will not try the cause in advance by passing upon a question involving the merits of the action upon a motion to vacate an order of arrest, unless there is a decided preponderance of evidence in favor of the defendant. *Frost v. M' Carger*, 14 How. 131; *Merritt v. Heckscher*, 50 Barb. 451; *Ely v. Mumford*, 47 id. 629; *Barret v. Gracie*, 34 id. 20; *Stuyvesant v. Bowran*, 34 How. 51; S. C., 3 Abb. N. S. 270; *Solomon v. Waas*, 2 Hilt. 179; *Levins v. Noble*, 15 Abb. 475; *Royal Insurance Co. v. Noble*, 5 Abb. N. S. 54; *Nelson v. Blatchfield*, 54 Barb. 630. In the latter class of cases the evidence in favor of the defendant necessary to cause the courts to vacate an order of arrest must be such as would oblige the judge at the trial either to non-suit the plaintiff, or to direct a verdict for the defendant. *Stuyvesant v. Bowran*, 34 How. 51; S. C., 3 Abb. N. S. 270; *Levins v. Noble*, 15 Abb. 475; *Royal Insurance Co. v. Noble*, 5 Abb. N. S. 54; *Barret v. Gracie*, 34 Barb. 20.

The Code permits such a trial of the cause, on a motion to vacate an order of arrest, as will enable the court to determine whether such evidence exists. *Corwin v. Freeland*, 6 N. Y. (2 Seld.) 565. See *Smith v. Knapp*, 30 N. Y. (3 Tiff.) 581.

g. When the motion will be granted. An order of arrest granted upon affidavits setting forth, as grounds for the arrest, facts independent of those giving the right of action, will be

When motion will be granted — Order vacating arrest.

vacated, where, on the argument of the motion, the plaintiff fails to make a case sufficient to entitle him to an order, notwithstanding the affidavits of the defendant. In such cases the burden of proof rests upon the plaintiff. *Chapin v. Seeley*, 13 How. 490; *Barron v. Sanford*, 14 id. 443; S. C., 6 Abb. 320, note; *Allen v. McCrasson*, 32 Barb. 662; *Frost v. M' Carger*, 14 How. 131; *Mulry v. Collett*, 3 Rob. 716; *Mecklin v. Berry*, 23 How. 380. So where the defendant has become insolvent, and a discharge has been granted under the insolvent act, an order of arrest obtained on facts showing fraud in contracting the debt, will be vacated on motion. *American Flask and Cap Company v. Son*, 7 Rob. 233; S. C., 3 Abb. N. S. 333; *Wright v. Ritterman*, 1 id. 428; S. C., 4 Rob. 704. The motion will be granted where, from the plaintiff's papers, it appears that a cause of action justifying an arrest has been joined with a cause of action on which no arrest could be had. *McGovern v. Payn*, 32 Barb. 83; *Smith v. Knapp*, 30 N. Y. (3 Tiff.) 581; *Miller v. Scherder*, 2 id. (2 Comst.) 262; *Lambert v. Snow*, 9 Abb. 91; S. C., 17 How. 517; 2 Hilt. 501; *Ely v. Steigler*, 9 Abb. N. S. 35; *Brown v. Ashbough*, 40 How. 226. So the motion will be granted where the affidavits fail to make a *prima facie* case from facts within the plaintiff's knowledge. *Sachs v. Bertrand*, 22 How. 95; S. C., 12 Abb. 433; *Bell v. Mali*, 11 How. 254; *Neville v. Neville*, 22 id. 500.

An order of arrest obtained on affidavits inconsistent with the material allegations of the complaint will be vacated on motion. *Wicker v. Harmon*, 21 How. 462; S. C., 12 Abb. 476; *Stelle v. Palmer*, 7 Abb. 181. So a failure to file the undertaking given upon procuring an order of arrest is a sufficient ground for vacating the order. Rule 5, Supreme Court. So where the undertaking is not indorsed with the judge's approval the order will be vacated with costs. *Newell v. Doran*, 21 How. 427.

Order Vacating Arrest.

(*Title of cause*).

On reading and filing notice of motion (and affidavits of and), and on the pleadings and proceedings in this action, and on motion of , counsel for the defendant, after hearing , counsel for plaintiff.

ORDERED: That the order of arrest granted by , on the day of , 18 , against the defendant Y. Z. be vacated, (and if bail has been given add), and that the bail heretofore given for the defendant be exonerated from liability.

When a motion will be denied — Conditions on vacating.

h. When a motion will be denied. In general, a motion to vacate an order of arrest will be denied where the determination of the order will also decide the action on the merits. *Solomon v. Waas*, 2 Hilt. 179; *Chapin v. Seeley*, 13 How. 490; *Barron v. Sanford*, 14 id. 443; S. C., 6 Abb. 320 note. The motion to vacate will also be denied where the defendant seeks to vacate the order by affidavits, merely denying the facts constituting the cause of action. *Cousland v. Davis*, 4 Bosw. 619. The same rule applies when the affidavit of the moving party merely denies the receipt of money in a fiduciary capacity. *Geller v. Seixas*, 4 Abb. 103; *Swift v. Wylie*, 5 Rob. 680. The motion to vacate will also be denied where the objection raised is merely technical, such as a misjoinder of parties, or that the summons was erroneously entitled, or has been amended by changing the form of relief demanded. *Webber v. Eoritz*, 11 Abb. 113; *Clark v. Pinckney*, 50 Barb. 226; *Union Bank v. Mott*, 6 Abb. 315; *Skinner v. Noyes*, 7 Rob. 228; *Bedell v. Sturta*, 1 Bosw. 634; S. C., 6 Abb. 319, note.

So the motion to vacate will be denied where the objections raised by the defendant relate merely to a variance between the complaint and the affidavits upon which the order of arrest was obtained, where the allegations are themselves sufficient and disclose a ground for arrest which is consistent with the allegations of the complaint. *Stelle v. Palmer*, 7 Abb. 181. The motion will also be denied when based upon an improper demand for relief inconsistent with the facts stated in the complaint, if the facts so stated are not inconsistent with the affidavit upon which the order was obtained. *Redfield v. Frear*, 9 Abb. N. S. 449. Nor will the order of arrest be vacated because an arrest was made under it at a time when the defendant was temporarily privileged. *Hart v. Kennedy*, 15 Abb. 290; S. C., 39 Barb. 186; 24 How. 425. Nor will the motion be granted on the ground that the signature of the affiant was inadvertently omitted from the copy affidavit served. *Barker v. Cook*, 40 Barb. 254; S. C., 25 How. 190; 16 Abb. 83.

The fact that the action is barred by the statute of limitations will not sustain a motion to vacate an order of arrest unless the defense is set up in the answer. *Arthurton v. Dalley*, 20 How. 311.

i. Conditions on vacating the order. In some cases the court will require, as a condition of vacating an order of arrest,

Conditions on vacating the order — Order on condition — Lunatic defendant.

that the defendant enter into a written stipulation not to bring an action for false imprisonment. See *Rigney v. Tallmadge*, 17 How. 556 ; *Merchants' Bank of New Haven v. Dwight*, 13 id. 366 ; S. C., 6 Duer, 659 ; *Salhinger v. Adler*, 2 Rob. 704 ; *Stewart v. Potter*, 37 How. 68. The power of the court to impose such a condition on the granting of a motion, is usually exercised where the motion is granted as a favor resting in the discretion of the court, and not as a matter of strict right. *Decker v. Judson*, 16 N. Y. (2 Smith) 439. If it appear that the arrest was made without any motives of malice, and on probable cause, the condition will generally be imposed. But if it appears that the arrest of the defendant was procured through malicious motives, and for unjustifiable purposes, the court will make the order vacating the arrest unconditional. *Northern Railway Company of France v. Carpentier*, 4 Abb. 47 ; *Bank of the United States v. Jenkins*, 18 Johns. 305. When the court in its discretion requires the defendant to stipulate not to bring an action for false imprisonment as a condition of granting a motion to vacate an order of arrest, the stipulation must be entered into or the arrest will be continued. There is no appeal from an exercise of the discretion of the court in this particular. *Edgerton v. Ford*, 11 Abb. 415.

Order on Condition.

(Title of cause.)

On reading and filing notice of motion (and affidavits of and) and on the pleadings and proceedings in this action, and on motion of , counsel for the defendant, after hearing , counsel for plaintiff.

ORDERED : That on the defendants stipulating within days to bring no action for false imprisonment, said motion be granted, and the order of arrest heretofore granted in this action be vacated with dollars costs to the defendant ; otherwise, that said motion be denied without costs.

j. Lunatic defendant. An order of arrest cannot be vacated on motion because the defendant in the action is insane. Under the act of 1842 a judge may order the discharge of a lunatic defendant, but only where the object of the order is to direct that the defendant be sent to the lunatic asylum. *Bush v. Pettibone*, 4 N. Y. (4 Comst.) 300 ; S. C., 5 Barb. 273 ; 1 Code R. N. S. 264 ; Laws of 1842, ch. 35.

k. Reducing bail. Section 204 of the Code provides for two distinct motions : the one to vacate an order of arrest, the other

Reducing bail — Appeal from order.

to reduce the amount of bail. The questions involved in the two motions depend on entirely different facts. On a motion to vacate, the question involved is, whether the defendant has been guilty of conduct that would render him liable to arrest; but, on a motion to reduce the amount of bail, the question relates to the amount of injury sustained by the plaintiff, and the amount of bail necessary to secure the defendant's appearance, to respond to the judgment. A motion to vacate an order of arrest cannot, therefore, include a motion to reduce the amount of bail, although the motion asks for other and further relief. *Smith v. Spalding*, 30 How. 339; S. C., 3 Rob. 615; *Baker v. Spackhamer*, 5 How. 251; S. C., 3 Code R. 248. Where a motion to reduce the amount of bail has been denied, it cannot be renewed without leave of the court. *Lovell v. Martin*, 21 How. 238; S. C., 12 Abb. 178; *Union Bank v. Mott*, 6 id. 315.

Notice of Motion to Reduce Bail.

(Title of cause.)

Please take notice, that on an affidavit, of which a copy is annexed, and on all the papers filed and served in this action, the undersigned will move the court, at a special term, to be held at . . . , on the . . . day of . . . next, at . . . o'clock in the forenoon, or as soon thereafter as counsel can be heard, that the amount of bail required by the order of arrest in this action be reduced, and for such other and further relief as may be just, and for the costs of this motion.

(Date.)

(Signature.)

(Address.)

Order Reducing Bail.

(Commence as in order vacating an order of arrest and continue),

ORDERED: That the bail taken, or to be taken, by the sheriff on the order of arrest of Y. Z., in this action, be reduced to dollars.

(Date.)

1. *Appeal from order.* An appeal from an order of a county judge, vacating an order of arrest made by him, will lie directly to the general term of the supreme court. *Lancaster v. Boorman*, 20 How. 421. In the same manner an appeal will lie to the general term from an order made at special term denying a motion to vacate an order of arrest. *Colonial Insurance Co. v. Force*, 8 How. 353. And the appeal will not be prejudiced by

False imprisonment.

the fact that, while it is pending, judgment has been entered against the defendant, and the bail have become charged. *Pacific Mutual Insurance Co. v. Machado*, 16 Abb. 451. But no appeal can be taken to the court of appeals from an order granting or refusing a provisional remedy, or from an order vacating or refusing to vacate such remedy. *Genin v. Tompkins*, 1 Code R. N. S. 415; *Miannay v. Blogg*, 41 N. Y. (2 Hand) 521.

The reduction of bail by a judge at chambers is a matter of discretion, with which the courts will not under ordinary circumstances interfere. *Hart v. Kennedy*, 15 Abb. 290; S. C., 39 Barb. 186; 24 How. 425.

m. False Imprisonment. Any defendant who has been arrested in a civil action, without due authority of law, may maintain an action for false imprisonment against the parties instrumental in making and procuring such arrest. Thus, where a party is arrested under a wrong christian name, the officer making the arrest, and all other persons concerned therein, are liable in an action of false imprisonment, even though the person arrested was the one intended in the order. *Miller v. Foley*, 28 Barb. 630; *Griswold v. Sedgwick*, 6 Cow. 456. See *Farnham v. Hildreth*, 32 Barb. 277; *Hoffman v. Fish*, 18 Abb. 76. And, in general, if a person unlawfully sues out process of arrest against another, and causes him to be imprisoned, and the process is afterward set aside because illegally issued, the defendant is entitled to recover damages for the wrong done him, without regard to the motives of the party causing the arrest, or the circumstances attending and explaining the act. *Parsons v. Harper*, 16 Gratt. (Va.) 64; *McQueen v. Heck*, 1 Cold. (Tenn.) 212; *Brown v. Chadsey*, 39 Barb. 253. See *Searll v. McCracken*, 16 How. 262; *Williams v. Garrett*, 12 id. 456; *Northern Railway Company of France v. Carpentier*, 4 Abb. 47; *Merchants' Bank v. Dwight*, 13 How. 366; S. C., 6 Duer, 659.

This action will lie where a party has been arrested on an order, and for a cause of action for which this remedy is not given by statute; or where the cause of action is one on which an order of arrest might properly issue, but where the plaintiff in the action fails to establish the facts on which alone an arrest might be based; or where the order on which the arrest was made was void *ab initio*. *Ib.*

Delivery of papers to plaintiff's attorney.

n. Delivery of papers to plaintiff's attorney. Papers used on a motion to vacate an order of arrest, or to reduce the amount of bail, when such motion is made upon notice, must be filed in the office of the clerk of the county where the venue is laid. *Savage v. Relyea*, 3 How. 276 ; S. C., 1 Code R. 42 ; *Anonymous*, 5 Cow. 13, Rule 3, Supreme Court. And when the motion is made in another county, the clerk must deliver to the party prevailing in the motion, unless the court shall otherwise direct, a certified copy of the rough minutes showing what papers were used or read upon such motion, with a note of the decision thereon, or the order directed to be entered properly certified. Rule 4, Supreme Court.

o. Filing papers with clerk. It is the duty of the party to whom such certified papers are delivered to cause the same to be filed, and the proper order entered in the proper county within ten days thereafter, under the penalty of losing the benefit of the order. Rule 4, Supreme Court. The plaintiff's attorney should also file the undertakings given upon procuring an order of arrest. Rule 5, Supreme Court.

The order or process, and the original affidavits on which an arrest is made, must also be filed with the clerk by the sheriff within ten days after the arrest. Rule 6, Supreme Court. And it is a general rule that when any order on a non-enumerated motion is entered, all the papers used on the motion shall be filed with the clerk, or the same may be set aside as irregular. Rule 7, Supreme Court.

p. Order of arrest to justify arrest on execution. In some cases it becomes necessary that the plaintiff should obtain an order of arrest and procure its service, or waive all right to an execution against the person of the defendant after judgment. Where the cause of action and the cause of arrest are identical, a judgment for that cause establishes conclusively a liability to arrest, and an execution against the person follows as of course. But if a plain and concise statement of the facts constituting the cause of action does not, of itself, show liability to arrest, no execution against the person can issue upon the judgment unless an order of arrest has been served before judgment. *Ward v. Henry*, 40 N. Y. (1 Hand) 124 ; Code, § 288.

Thus in order to obtain an execution against the person where the complaint alleges the contracting of a debt in a fiduciary character, it is necessary to obtain an order of arrest before judg-

Order of arrest to justify arrest on execution.

ment. *Wood v. Henry*, 40 N. Y. (1 Hand) 124. So where the action is upon contract to recover a debt it will be necessary to procure an order of arrest before judgment, although the complaint improperly alleges fraud in contracting the debt, or that the defendant has disposed of his property with intent to defraud his creditors. *Elwood v. Gardner*, 10 Abb. N. S. 238; S. C. 45 N. Y. (6 Hand) 349; and see *Albany Law Journal* 307. But where the cause of action is founded on a tort, which will authorize the issuing of an order of arrest, and a contract is set forth in the complaint merely as a matter of inducement, an execution may issue against the body although no arrest was made before judgment. *Lembke's Case*, 11 Abb. N. S. 72. See *Townsend v. Hendricks*, 40 How. 143. Thus a complaint setting forth a cause of action, equivalent to the old action of trover, will authorize an execution against the person, although the complaint sets forth a contract of bailment and demands judgment for the sum received by the defendant as bailee. *Lembke's Case*, 11 Abb. N. S. 72.

But in all cases in which an order of arrest has been obtained before judgment and has been vacated, the right to an execution against the person is destroyed. *Stelle v. Palmer*, 11 Abb. 62.

CHAPTER II.

REPLEVIN, OR CLAIM AND DELIVERY.

ARTICLE I.

REPLEVIN IN GENERAL.

Section 1. History and use as a remedy.

a. Origin and former use at common law. According to the Mirror, the old action of replevin was devised by Glanvil, Chief Justice to King Henry the Second, for the purpose of affording a remedy against *distress* wrongfully taken. Blackstone assumes that this was the only use made of the remedy, but the position he assumes is evidently not well taken, and is not warranted by the books. The old authorities are that "replevin lies for goods taken tortiously, or by a trespasser, and that the party injured may have replevin or trespass at his election." The action was usually brought to try the legality of a distress, but was not confined to this alone, but would lie for any unlawful taking of a chattel. *Stauff v. Maher*, 2 Daly, 142; *Ely v. Ehle*, 3 N. Y. (3 Comst.) 506; *Pangburn v. Patridge*, 7 Johns. 140; *Mason v. Dixon*, Sir Wm. Jones, 173; *Bishop v. Montague*, Cro. Eliz. 824. The object of the remedy was, to restore to the party from whom chattels had been wrongfully taken, all of his former right to their control, upon the giving of security to prosecute the action, and, in case the right to the property should be adjudged against him, to restore it to the true owner. At common law the party claiming the right to the possession of personal property could enforce his claim by no process other than the writ of replevin, which issued out of chancery, commanding the sheriff to deliver the property to the owner, and afterward do justice in respect to the matter in his own county court. This form of procedure was attended with two serious disadvantages. As the remedy was chiefly employed in cases of distress, the nature of the property distrained demanded a prompt and efficient remedy to prevent serious loss to the owner. This could not be had at common law. Writs for all England

must issue from the office at Westminster, and great delay and inconvenience necessarily attended its employment in distant parts of the kingdom. Neither did the defendant in the action receive any valid security for the return of the property, if judgment was given in his favor, and the judgment was in many instances rendered of no effect by the disposal of the property during the pendency of the action. To remedy these defects, various statutes were subsequently enacted, calculated to protect the rights of both of the claimants.

b. Changes by statutes. The first essential change was wrought by the statute of Marlbridge, which dispensed with the suing out of the writ, and provided that the sheriff should immediately proceed to replevy the goods upon plaint to him made. And it was further provided by the statute 1 Philip and Mary, chapter 12, that the sheriff should make at least four deputies in each county, for the sole purpose of making replevins. The security to be given on procuring the return of the property was that required by the statute of Westm. 2, 13 Edw. I, chapter 2.

The party replevying was obliged to put in pledges to prosecute the action; and also pledges to return the distress again if the right were determined against him. The sheriff was answerable for the sufficiency of the security taken by him. The statute 11, Geo. II, c. 19, specified what the security should be in a replevin on a distress for rent, and required that it should consist of a bond with two sureties in a sum of double the value of the goods distrained, conditioned for the speedy prosecution of the suit, and for the return of the goods. This bond was made assignable to the defendant, and, on being forfeited, could be sued in the name of the assignee. On the receipt of this bond it became the duty of the sheriff to immediately restore the goods to the possession of the party distrained upon, unless the distrainer claimed a property in them.

In this contingency the party replevying was required to sue out a writ *de proprietate probanda*, in which the sheriff was to try by an inquest, in whom the right to the property existed previous to the distress. If the sheriff found this right to be in the distrainer he could proceed no farther, but must return the claim of property to the court of king's bench or common pleas, to be there disposed of. Co. Litt. 145.

But if no claim of property was made, or if the sheriff's inquest determined it against the distrainer, then the sheriff was

to replevy the goods, and deliver them to the party replevying, who thereupon brought his action of replevin. The distrainor, now the defendant in the action, made *avowry*, and set up his right to the goods distrained; 3 Bla. Com. 149. *Stauff v. Maher*, 2 Daly, 142. The other pleadings and proceedings under these statutes have but little practical value as illustrations in connection with present forms of procedure.

c. Replevin under the Revised Statutes. The essential features of the English statutes were re-enacted and consolidated in this State under the act of 1788. Revised Laws of 1813, p. 91. Under the Revised Statutes the old action of *detinue* was abolished, or rather incorporated in the action of replevin. 2 R. S. 522 (540); 3 R. S. (5th ed.) 867, § 17; *Snow v. Roy*, 22 Wend. 602.

It was provided that whenever any goods or chattels have been wrongfully distrained, or otherwise wrongfully taken, or shall be wrongfully detained, an action of replevin may be brought for the recovery thereof, and for the recovery of the damages sustained by reason of such unjust caption or detention, except that no replevin shall lie for any property taken by virtue of any warrant for the collection of any tax, assessment or fine, in pursuance of any statute of this State. 2 R. S. 522 (540); 3 R. S. (5th ed.) 845, §§ 1, 4. No replevin shall lie at the suit of the defendant in any execution or attachment to recover goods or chattels seized by virtue thereof, unless such goods or chattels are exempted by law from such execution or attachment; nor shall a replevin lie for such goods or chattels at the suit of any other person unless he shall, at the time, have a right to reduce into his possession the goods taken. *Ib.*, § 5. Under these statutes there were two distinct forms of action. Where the original taking of the goods was tortious, replevin in the *cepit* would lie; but where the taking was lawful and the detention only was unlawful, replevin in the *detinet* only would lie. *Barrett v. Warren*, 3 Hill, 348; *Ely v. Ehle*, 3 N. Y. (3 Comst.) 506; *Ross v. Cassidy*, 27 How. 416. This distinction does not exist under the Code. *Zachrisson v. Ahman*, 2 Sandf. 68.

d. Remedy under the Code. The action of replevin, in all except its form, and the additional provisional remedy provided by section 211 of the Code, remains as it existed under the Revised Statutes. The form and name of the action are abolished, but the cause, the right and the remedy remain to be en-

forced and pursued, not by the old formula, but by the newly prescribed proceeding. The effect given to the action by the courts, under the Revised Statutes, must be regarded as continuing unrepealed by the Code. *Porter v. Willet*, 14 Abb. 319.

The remedy provided by the Code, to recover possession of personal property, is applicable to every case in which the action of replevin would lie under the Revised Statutes. *Nichols v. Michael*, 23 N. Y. (9 Smith) 264; *Ross v. Cassidy*, 27 How. 416; *Brockway v. Burnap*, 16 Barb. 309. But the change introduced by the Code in the former method of seeking and applying the remedy is too important to be overlooked. Under the Revised Statutes it was indispensable that the action should be commenced by writ, commanding the sheriff to replevy the goods, on the execution of a bond, and prohibiting the plaintiff from taking any step until the sheriff received the writ, with the affidavit and bond required, for it was then only that he could serve the summons, which was required to be according to the tenor of the writ. The Code, however, leaves it optional with the plaintiff to proceed to recover the possession of the property, under the provisions of section 206 of the Code, before judgment in the action, or to seek the specific recovery of the property after judgment. It is not necessary that the plaintiff in an action to recover the possession of personal property, under the Code, should claim the delivery of the property before judgment, and furnish security to the defendant, as was indispensable in the old action of replevin. Although he may not resort, in the action, to the provisional remedy of claim and delivery, he may still have judgment and execution for the restitution of the property, with damages for its detention, if he succeeds in establishing his right to recover. *Vogel v. Badcock*, 1 Abb. 176; *Corbin v. Milton*, 27 How. 76. It is only imperative that the plaintiff shall give the security required by section 209 before he can demand the return of the goods *before* judgment, and not that the giving of such security shall be the condition of obtaining the restitution of specific property in any case. *Ib.* But it is the giving of security alone that entitles the plaintiff or defendant to the provisional remedy provided in sections 208 to 211 of the Code. *Nosser v. Corwin*, 36 How. 540.

In abrogating the old action of replevin, and in furnishing a new remedy to take its place, it was not the intention of the legislature to abridge the old remedy by substituting another of less

Replevin, in what cases a proper remedy.

general application. As full, effectual, and complete relief can be obtained in an action for the recovery of possession of personal property under the Code, as was obtainable in an action of replevin under the Revised Statutes. *Nichols v. Michael*, 28 N. Y. (9 Smith) 264; *Brockway v. Burnap*, 16 Barb. 309. But while the Code has furnished a complete remedy in such cases, it has failed to establish a complete system of practice; and when, under the present system, questions of practice arise as to which the Code is silent, it becomes necessary to resort to the former practice to supply the omission. Many of the provisions of the Revised Statutes in relation to the action of replevin are still in force although the action in its old form is abrogated; and these provisions may be relied upon, either to aid in the construction of the Code, or to settle doubtful questions of practice. *Wilson v. Wheeler*, 6 How. 49; S. C., 1 Code R. N. S. 402. *Stauf v. Maher*, 2 Daly, 142.

ARTICLE II.

REPLEVIN, IN WHAT CASES A PROPER REMEDY.

Section 1. For what property.

a. Personal property generally. The action of replevin is given where the relief sought is the recovery of specific personal property, with such incidental damages as may have been sustained by reason of its taking or detention. The Code declares that the words "personal property," as used in the act by which it was created, shall be construed to include money, goods, chattels, things in action and evidences of debt. Code, § 463. The term as used in the statutes in relation to the action of replevin excludes every thing pertaining to the realty. Fixtures while attached to the freehold cannot be replevied. But it is not a mere question of fastening that determines what constitutes a fixture, and no rule of universal application can be given that will draw a clear line between personal property and what the law will decide to be a portion of the realty. As far as relates to the action of replevin it is sufficient to lay down as a general rule that what are properly known as fixtures cannot be replevied. *Cresson v. Stout*, 17 Johns. 116; *Nibley v. Smith*, 4 Term R. 504. But where fixtures are severed from the freehold, their character as personal property is restored and they may be

For what property — Money.

replevied. *Gardner v. Finley*, 19 Barb. 317; *Morgan v. Varick*, 8 Wend. 587. *Prima facie*, a building on another's land is a fixture, and a part of the realty. But the parties concerned may control the legal effect of any transaction between them by an express agreement. And if they agree in terms, that a dwelling-house shall, as between them, be considered strictly as a personal chattel, it takes that character, and trover will lie for its conversion. *Smith v. Benson*, 1 Hill, 176; *Ritchmyer v. Morse*, 37 How. 888; S. C., 3 Keyes, 349; 1 Trans. App. 355; 5 Abb. N. S. 44. See *Gray v. Oyler*, 2 Bush. (Ky.) 256; *Hinckley v. Baxter*, 13 Allen, 139; *Shaw v. Carbreys*, id. 462; *Foy v. Reddick*, 31 Ind. 414; *Aldrich v. Parsons*, 6 N. H. 555; *Vausse v. Russel*, 2 McCord (S. C.), 329; *Bringholz v. Munzenmaier*, 20 Iowa, 518; *Mills v. Redick*, 1 Nebr. 437. It is a familiar rule of the common law that where the action of trover can be maintained replevin will lie. *Rogers v. Arnold*, 12 Wend. 30. Growing grass may become so far personal property by express agreement as to be transferred by a chattel mortgage, and the title so acquired would be sufficient to enable the mortgagee to maintain an action of replevin against one wrongfully detaining it after its severance from the freehold. See *Jencks v. Smith*, 1 N. Y. (1 Comst.) 90; S. C., 3 Denio, 592; 1 How. App. Cas. 150. As to the law of fixtures, see *Ombony v. Jones*, 19 N. Y. (5 Smith) 234; S. C., 21 Barb. 520; *Murdock v. Gifford*, 18 N. Y. (4 Smith) 28; *Porter v. Cromwell*, 40 N. Y. (1 Hand) 287; *Teaf v. Hewitt*, 1 Ohio St. 511.

b. Money. This action lies for the specific recovery of money whether in the form of specie or of bank bills. The only requisite in this respect is, that the money be in some manner capable of identification. There is nothing in the nature of bills or specie making a delivery work a change of ownership, unless delivered with that intent. *Sager v. Blain*, 44 N. Y. (5 Hand) 445; *Grand Trunk Railway Company v. Edwards*, 56 Barb. 408; *Graves v. Dudley*, 20 N. Y. (6 Smith) 76; *Gordon v. Hostetter*, 37 id. (10 Tiff.) 99; S. C., 4 Abb. N. S. 265; 4 Trans. App. 375. But where the money is paid into a bank, and passed generally to the credit of the party paying, the title passes to the bank. But not so in case of a special deposit, where the specific money is to be kept for the depositor. *Commercial Bank of Albany v. Hughes*, 17 Wend. 94; *Graves v. Dudley*, 20 N. Y. (6 Smith) 76; *Gordon v. Hostetter*, 37 N. Y. (10 Tiff.) 99; S. C., 4

Abb. N. S. 265 ; 4 Trans. App. 375. See *Draycot v. Piot*, Cro. Eliz. 818 ; *Hall v. Dean*, id. 841 ; *Kinaston v. Moor*, Cro. Car. 89.

c. Chose in action. It is a well-settled rule of law that an action can be maintained for the conversion of a chose in action which has been pledged as a security for a debt. *Luckey v. Gannon*, 6 Abb. N. S. 209 ; S. C., 37 How. 134 ; 1 Sweeny, 12. It is equally well settled that where trover will lie, replevin may be maintained. *Barrett v. Warren*, 3 Hill, 348. Trover will lie for the recovery of an insurance policy. *Luckey v. Gannon*, 6 Abb. N. S. 209 ; S. C., 37 How. 134 ; 1 Sweeny, 12. So it will lie for the recovery of a bond and mortgage, deposited as collateral security. *Campbell v. Parker*, 9 Bosw. 322. This is not in accordance with the English rule which holds that a mortgage cannot be replevied, as it savors of the realty.

d. Evidences of title. An assignee of a bill of lading, who is deemed to be the consignee thereof, may maintain replevin to recover the possession of the property mentioned in such bill, as against one who claims under an inferior title. *Dows v. Rush*, 28 Barb. 157. So any transferable evidence of title may be replevied whether it be a bill of lading, a certificate of stock, a bill of exchange, or a warehouse entry. *Knehue v. Williams*, 1 Duer, 597 ; S. C., 11 N. Y. Leg. Obs. 187.

e. Evidences of debt. As a general rule, the action of replevin may be maintained for the recovery of a promissory note in the hands of a third person. But the maker of such note cannot bring an action of replevin for its recovery after payment, unless the note has a special value as a voucher. *Todd v. Crookshanks*, 3 Johns. 432 ; *Cahoon v. Bank of Utica*, 7 N. Y. (3 Seld.) 486 ; S. C., 7 How. 401 ; *Streever v. Bank of Fort Edward*, 34 N. Y. (7 Tiff.) 413 ; *Birdsall v. Russell*, 29 id. (2 Tiff.) 220 ; *Wheeler v. Allen*, 49 Barb. 460 ; *Savery v. Hays*, 20 Iowa, 25.

Section 2. In favor of whom.

a. Owner of property. In order to entitle the plaintiff, in an action to recover the possession of personal property, to the delivery of the property before judgment, it must appear that he is the owner of the property claimed, or is lawfully entitled to its possession. Code, § 207. The fact of ownership will not, of itself, entitle the plaintiff to recover in an action of replevin. That fact must be coupled with the present right of possession at the time of the commencement of the action. *Wood v. Orser*,

Persons entitled to possession and in a representative character—Officers, etc.

25 N. Y. (11 Smith) 348; *Bush v. Lyon*, 9 Cow. 52; *Redman v. Hendricks*, 1 Sandf. 32; *Rogers v. Arnold*, 12 Wend. 30; *Sharp v. Whittenhall*, 3 Hill, 576.

b. Persons entitled to possession. It is sometimes difficult to determine who is entitled to bring an action of replevin by virtue of the right to possession. Absolute ownership will not *per se* give the right of action, while a mere equitable interest, coupled with possession, may be sufficient to enable a person to maintain replevin against a wrong-doer who has disturbed him in his possession, although the absolute ownership of the property is in another. *Frost v. Mott*, 34 N. Y. (7 Tiff.) 253; *Johnson v. Carnley*, 10 id. (6 Seld.) 570. A person having a lien upon goods has such a special property in them as will entitle him to maintain an action of replevin against the owner who takes them from him without first satisfying the lien. *Baker v. Hoag*, 7 N. Y. (3 Seld.) 555; *Ingersoll v. Van Bokkelen*, 7 Cow. 670; *Wheeler v. McFarland*, 10 Wend. 318; *Rogers v. Arnold*, 12 id. 30. So the assignee of one whose goods have been tortiously removed and detained may maintain replevin against the wrongful taker, and recover in his own name. *McKee v. Judd*, 12 N. Y. (2 Kern.) 622; *Merrill v. Grinnell*, 30 id. (3 Tiff.) 594; *Waldron v. Willard*, 17 id. (3 Smith) 466; *Dows v. Rush*, 28 Barb. 157.

c. Persons in a representative character. An action of replevin, commenced by a party who has died before judgment, may be continued in the name of the personal representatives of the deceased. *Lahey v. Brady*, 1 Daly, 443; *Mellen v. Baldwin*, 4 Mass. 480; *Potter v. Van Vranken*, 36 N. Y. (9 Tiff.) 619; S. C., 2 Trans. App. 73. So the action may be commenced by the personal representatives of a party deceased, where the goods taken continue in specie in the hands of the wrong-doer. *Potter v. Van Vranken*, 36 N. Y. (9 Tiff.) 619; S. C., 2 Trans. App. 73; *Chamberlain v. Williamson*, 2 Maule & Selw. 408; *Countess of Rutland's Case*, 1 Cro. Eliz. 377; *Berwick v. Andrews*, 2 Ld. Raym. 971.

d. Officers, sheriffs, etc. An officer who has taken goods into his possession by virtue of a process of execution may maintain replevin against a third person who has taken them away without right or authority. *Barker v. Miller*, 6 Johns. 195; *Barker v. Binniger*, 14 N. Y. (4 Kern.) 270; *Howland v. Willetts*, 9 id. (5 Seld.) 170; S. C., 5 Sandf. 219. A person who receipts property levied

Partners — Against whom — Persons in a representative character — Sheriffs, etc.

upon by a constable or sheriff has neither a general or special property in the goods, and cannot maintain replevin in his own name, although the property be tortiously taken by a stranger. He acts as the mere agent of the officer. *Dillenback v. Jerome*, 7 Cow. 294.

e. Partners. One partner cannot maintain replevin against another partner for the recovery of the exclusive possession of the partnership stock. Each is entitled to the possession, and the possession of either is the possession of both. *Azel v. Betz*, 2 E. D. Smith, 188; *Koningsburgh v. Launitz*, 1 id. 215. But, where two persons are partners and one of them finds the stock, and the other does the work, and the working partner absconds, the partner finding the stock can maintain replevin for it in his own name, if it be taken from the possession of the working partner before he has begun to work it up. *Boynnton v. Page*, 13 Wend. 425. See *Russel v. Allen*, 13 N. Y. (3 Kern.) 173; *Foster v. Magee*, 2 Lans. 182.

Section 3. Against whom.

a. Party wrongfully taking or detaining. In general, the action of replevin will lie against any person wrongfully taking or detaining the personal property of another. The distinction once made between actions in the *cepit*, and actions in the *detinet*, is now virtually ignored, and the action in the *detinet* lies where the taking was tortious as well as where the wrong consists in its detention only. *Zachrisson v. Ahman*, 2 Sandf. 68.

b. Persons in a representative character. Although persons acting in a representative character, as executors, administrators etc., may maintain replevin against a party who has wrongfully detained the property of the deceased, yet, such administrators or executors are not liable, in an action of replevin, for any wrongful act of their testator, unless they retain after demand the specific chattels wrongfully taken by him during his life-time. *Hambly v. Trott*, 1 Cowp. 371; *Mellen v. Baldwin*, 4 Mass. 480; *Mason v. Dixon*, Sir Wm. Jones, 173; *Lahey v. Brady*, 1 Daly, 443; *Potter v. Van Vranken*, 36 N. Y. (9 Tiff.) 619; S. C., 2 Trans. App. 73.

c. Sheriffs, etc. Replevin will lie against a sheriff who levies upon the property of a person other than the defendant named in the process. The property taken is not in the custody of the law, as regards the real owner. The sheriff, in such cases, acts without authority, or color of authority. He is a wrong-doer,

and, if he acts by the direction of the plaintiff, both are trespassers. *Marsh v. Backus*, 16 Barb. 483; *Clark v. Skinner*, 20 Johns. 465; *Dunham v. Wyckoff*, 3 Wend. 280. The same rule applies, whether the goods were taken under an attachment or on an execution. *Marsh v. Backus*, 16 Barb. 483. An action of replevin will lie against a sheriff, in such cases, even though the property has never been removed, or taken into the actual possession of the officer. Any unlawful intermeddling with the property of another, or any exercise of dominion over it, in defiance or exclusion of the owner, even though there be no manual interference, is such an unlawful taking as will authorize an action of replevin against the officer. *Neff v. Thompson*, 8 Barb. 213; *Wintringham v. Lafoy*, 7 Cow. 735; *Allen v. Crary*, 10 Wend. 349; *Fonda v. Van Horne*, 15 id. 631.

It is provided by statute that no replevin shall lie for any property taken by virtue of any warrant for the collection of any tax, assessment, or fine, in pursuance of any statute of this State. 2 R. S. 522 (540), § 4; Code, § 207; *People v. Albany Common Pleas*, 7 Wend. 485. By this it must be understood that an action will not lie to recover the possession of personal property, subject to execution, from an officer who holds it under a tax warrant against the plaintiff, regular upon its face, and issued by the proper authorities. *Hudler v. Golden*, 36 N. Y. (9 Tiff.) 446; S. C., 2 Trans. App. 316. But, where it is apparent, on the face of the warrant, that it was issued without jurisdiction, replevin will lie against the officer. *Wright v. Briggs*, 2 Hill, 77; *George v. Chambers*, 11 Mees. & Wels. 149. Where the statute has, from considerations of public policy, prohibited the remedy in this instance, it has not restricted the use of other concurrent remedies—such as trespass or trover. *People v. Albany Common Pleas*, 7 Wend. 485. And notwithstanding the provisions of the Revised Statutes that replevin shall not lie for goods taken for a tax pursuant to statute, the rightful possessor of goods, unlawfully seized under a warrant against another, for non-payment of taxes, may maintain an action of replevin for their recovery. *Stockwell v. Vietch*, 15 Abb. 412; S. C., 38 Barb. 650; *Travers v. Ins. Co.*, 19 Mich. 98.

d. Receiptors. Although a receiptor may not maintain an action of replevin against a party removing goods from his possession, he is responsible to the officer from whom he receives them, and may be proceeded against, on a refusal to redeliver

Where the action lies.

them, either in an action of replevin or trover for the goods, or in an action in the nature of assumpsit on the receipt. *Dezell v. Odell*, 3 Hill, 215.

Section 4. Where the action lies.

a. For the wrongful taking. The distinction between the different forms of the action of replevin is not wholly unimportant, although the form of the pleadings in the action has been almost totally changed by the Code. The right of the plaintiff to recover the possession of personal property by an action of replevin, is the same, whether the property was wrongfully taken by the defendant, or came lawfully into his possession. But, in order to fix the liability of the defendant in the latter case, it is necessary, in most instances, that a demand should be made and an opportunity afforded for the restoration of the property. *Tallman v. Turck*, 26 Barb. 167; *Barrett v. Warren*, 3 Hill, 348; *Nash v. Mosher*, 19 Wend. 431. It is the refusal of the defendant to restore the property to the party legally entitled to its possession, that constitutes a wrongful detention, where the possession of the property was legally obtained. But it is the duty of the defendant to establish, by proof, that he came into the possession in good faith and for a lawful purpose, before he can avail himself of the defense that no demand was made before action, as, until such proof has been made, he will be deemed as much a wrong-doer as an original taker, and will not be deemed entitled to a demand. *Ib.*

As a general rule, replevin in the *cepit*, or for the wrongful taking, lies only where an action of trespass might have been brought. *Barrett v. Warren*, 3 Hill, 348; *Ely v. Ehle*, 3 N. Y. (3 Comst.) 506; *Stockwell v. Phelps*, 34 id. (7 Tiff.) 363. In order to maintain this action, the plaintiff must show that he was either in actual possession, or entitled to immediate possession, at the time the property was taken. *Stockwell v. Phelps*, 34 N. Y. (7 Tiff.) 363; *Redman v. Hendrick*, 1 Sandf. 32. And if the plaintiff fails to establish an exclusive right to possess and control the property he cannot recover. *Rogers v. Arnold*, 12 Wend. 30. But right of possession must not be confounded with absolute ownership. Right to the possession *for the time*, and dominion of the goods and chattels is all that is essential. *Ib.* Actual possession of the property at the time that it was taken, coupled with an equitable interest in it, is sufficient to maintain this action, although the general property be in a stran-

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ger. *Johnson v. Carnley*, 10 N. Y. (6 Seld.) 570 ; *Frost v. Mott*, 34 id. (7 Tiff.) 253.

Property in a stranger will not avail the defendant as a defense in an action of replevin, unless he in some way connects his title with that of the stranger, and thus establishes a superior title to that of the plaintiff, such as will justify the taking of the property out of his possession. *Gerber v. Monie*, 56 Barb. 652 ; *Duncan v. Spear*, 11 Wend. 54 ; *Rogers v. Arnold*, 12 id. 30 ; *Hoyt v. Van Alstyne*, 15 Barb. 568 ; *Davis v. Hoppock*, 6 Duer, 254 ; *King v. Orser*, 4 id. 431.

The right of a vendor to disaffirm a sale, and to recover his goods in an action of replevin, exists wherever the vendee obtained such goods on credit, with the preconceived design to cheat and defraud the vendor. *Hall v. Naylor*, 18 N. Y. (4 Smith) 588 ; *Nichols v. Michael*, 23 id. (9 id.) 274. A sale and delivery of goods procured through the false representations of the vendee in regard to his solvency and credit, passes no title whatever to the property, as between the parties, and the vendor may recover the property in an action of replevin, unless it has passed into the possession of a *bona fide* holder for value. *Ib.* ; *Hunter v. Hudson River Iron and Machine Co.*, 20 Barb. 493 ; *Barringer v. Hammond*, 4 Trans. App. 115 ; *Wilson v. Nason*, 4 Bosw. 155.

But it is only in a few exceptional cases, as where a fraudulent vendee becomes a vendor and has the usual *indicia* of ownership, and the true owner has parted with the possession of the goods sold, that such vendor can make a sale of them, which will be valid as against such rightful owner. The general rule is, that a seller of merchandise having no title can convey none as against the true owner. *Spaulding v. Brewster*, 50 Barb. 142 ; *Williams v. Merle*, 11 Wend. 80 ; *Saltus v. Everett*, 20 id. 267 ; *Ash v. Putnam*, 1 Hill, 302 ; *Ely v. Ehle*, 3 N. Y. (3 Comst.) 506 ; *Brower v. Peabody*, 13 id. (3 Kern.) 121 ; *Ross v. Cassidy*, 27 How. 416 ; *Linnen v. Cruger*, 40 Barb. 633.

On default in the payment of a chattel mortgage, the mortgagee's title to the property becomes absolute, and he may maintain replevin against one who tortiously takes such property from the mortgagor. *Fuller v. Acker*, 1 Hill, 473 ; *Hulsen v. Walter*, 34 How. 385 ; *Bank of Rochester v. Jones*, 4 N. Y. (4 Comst.) 497.

For the wrongful detention.

So where the mortgagor is to have the possession of the property until demand, or default in the payment of the debt, he may bring replevin against the mortgagee if he takes the property before such default or demand. *Newsam v. Finch*, 25 Barb. 175.

The good faith of a party taking personal property from a mortgagee, who has acquired an absolute title by reason of a default in the payment of the mortgage debt, will not protect the taker from liability in an action for the wrongful taking and detention of such property. *Levin v. Russell*, 42 N. Y. (3 Hand) 251.

Replevin will lie against a vendee to whom goods were sold conditionally, when such vendee retains the goods and fails to fulfill the condition upon which the sale was made. *Leven v. Smith*, 1 Denio, 561; *Russell v. Minor*, 22 Wend. 659. See *Smith v. Lynes*, 5 N. Y. (1 Seld.) 41; *Palmer v. Hand*, 13 Johns. 484; *Morris v. Reaford*, 18 N. Y. (4 Smith) 552; *Haggerty v. Palmer*, 6 Johns. Ch. 437. Any valid lien is such a special property in goods as will entitle the holder to maintain an action of replevin against the owner who has taken such goods without the consent of the holder of the lien. *Ingersoll v. Van Bokkelen*, 7 Cow. 670; *Baker v. Hoag*, 7 N. Y. (3 Seld.) 555; *Wheeler v. M^r Farland*, 10 Wend. 318; *Rogers v. Arnold*, 12 id. 30.

It was formerly held that replevin would not lie where the defendant had divested himself of the property claimed before the commencement of the action. But it is a well-settled rule that replevin will lie, notwithstanding the fact that the defendant has parted with the goods before the commencement of the action. *Nichols v. Michael*, 23 N. Y. (9 Smith) 264; *Knapp v. Smith*, 27 id. (13 id.) 277; *Brockway v. Burnap*, 16 Barb. 309; *Ross v. Cassidy*, 27 How. 416.

b. For the wrongful detention. The old action of detinue was the proper remedy where there was a wrongful detainer of personal property. This action would lie wherever the defendant had been in possession, whether he retained it, or had wrongfully parted with it. *Jones v. Dowle*, 9 Mees. & Wels. 19; *Garth v. Howard*, 5 Car. & P. 346. In this State, when the action of detinue was abolished by statute (2 R. S. 553, § 15), the action of replevin was extended so as to cover the cases formerly included in both actions. 2 R. S. 522, § 1; *Snow v. Roy*, 22 Wend. 602. The Code has not changed the rule. Therefore, where one has

obtained possession of goods by fraud, and has transferred the same to a third party by assignment, both the vendee of the goods and his assignee are liable to a joint action by the vendor to recover possession. *Nichols v. Michael*, 23 N. Y. (9 Smith) 284. But where personal property has come into the possession of the defendant by the delivery of the wrong-doer, it is not until after a refusal to deliver it up on demand that an action for the recovery of the property will lie against him. *Ely v. Ehle*, 3 N. Y. (3 Comst.) 506; *Barrett v. Warren*, 3 Hill, 348; *Fuller v. Lewis*, 13 How. 219; S. C., 3 Abb. 383; *Howell v. Kroose*, 2 id. 167; S. C., 4 E. D. Smith, 357.

So the action of replevin will lie at the suit of the owner, to recover the possession of goods that have been willfully mingled with those of a trespasser. *Silsbury v. McCoon*, 3 N. Y. (3 Comst.) 379; S. C., 4 Denio, 332; 6 Hill, 425; *Betts v. Lee*, 5 Johns. 348. The only condition requisite to a recovery is that the plaintiff shall be able to identify the property as his own. Any change in the form of the property, or any amount of labor or skill expended upon it, will not divest the owner of his title, or give a lien to the wrong-doer. *Ib.* Thus, where one wrongfully takes trees, and saws them into plank or boards, the owner may replevy the plank or bring trover for their conversion. *Brown v. Sax*, 7 Cow. 95. Or where wood has been converted into coal, corn into whisky, leather into boots or shoes, cloth into garments, or trees into rails. *Silsbury v. McCoon*, 3 N. Y. (3 Comst.) 380, note. The mere taking by one party of the mill logs of another, and mingling them with his own, will not constitute a confusion of goods. But where such party fraudulently takes the logs and manufactures them into boards, and intermixes those boards with his own, so that they cannot be distinguished, with the intent of thereby depriving the plaintiff of his property, the owner of the logs may maintain replevin for the whole pile of boards. *Wingate v. Smith*, 20 Me. 287.

If a party having charge of the property of another so confounds it with his own that the line of distinction cannot be traced, it is for him to distinguish his own property or lose it. *Hart v. Ten Eyck*, 2 Johns. Ch. 62.

As a rule, the original owner of the property may recover it from the vendee of a wrongful taker, so long as he can identify it. *Silsbury v. McCoon*, 3 N. Y. (3 Comst.) 379; S. C., 4 Denio, 332; 6 Hill, 425; *Joslin v. Cowee*, 60 Barb. 48.

On execution — When the action does not lie.

c. On execution. The rule as to where replevin will lie against a sheriff or other officer to recover property taken on execution, or on a tax warrant, has been given, *ante*, 716, 717, in article 2, section 3, c., of this chapter. The Revised Statutes provide, that no replevin shall lie at the suit of the defendant in any execution or attachment to recover goods or chattels seized by virtue thereof, unless such goods and chattels are exempted by law from such execution or attachment; nor shall a replevin lie for such goods or chattels at the suit of any other person, unless he shall at the time have a right to reduce into his possession the goods taken. 2 R. S. 523 (540), § 5. The Code contains a similar provision. Code, § 207. A defendant in the execution cannot bring replevin against the officer. *Gardner v. Campbell*, 15 Johns. 401. As to such defendant, the property is in the custody of the law, and he is concluded by the judgment against him. But this rule has no application to the rights of a stranger whose property has been wrongfully taken on an execution against another person. In such a case replevin will lie against the officer levying on the property and the plaintiff directing the levy. *Clark v. Skinner*, 20 Johns. 465; *Dunham v. Wyckoff*, 3 Wend. 280; *Allen v. Crary*, 10 id. 349; *Acker v. Campbell*, 23 id. 372; *Marsh v. Backus*, 16 Barb. 483.

Section 5. When the action does not lie.

a. Where the property is restored before action. Replevin will not lie where the defendant restores the property before the commencement of the action, or where he unconditionally offers to restore it before suit brought. *Nosser v. Corwin*, 36 How. 540; *Christie v. Corbett*, 34 id. 19; *Savage v. Perkins*, 11 id. 17. The approval of the undertaking by the sheriff is not the allowance of a provisional remedy within the meaning of section 139 of the Code, and does not determine the time of the commencement of the action, and if the property sought to be recovered is unconditionally tendered to the plaintiff before the service of the summons, an action of replevin will not lie. *Ib.*

b. Where property replevied is in hands of officer. Replevin will not lie at the suit of a stranger to the action, to recover from the sheriff or other officer the goods taken in pursuance of section 206 of the Code. The only remedy given to such third party is that prescribed by section 216 of the Code. *Edgerton v. Ross*, 6 Abb. 189; *Hunt v. Mootry*, 10 How. 478; *Haskins v. Kelly*, 1 Abb. N. S. 63; S. C., 1 Rob. 160.

Where prohibited by statute—Real and personal property—Election of remedies.

c. Where prohibited by statute. From considerations of public policy, the statutes declare that replevin shall not lie to recover goods or chattels subject to and taken under execution, when such recovery is sought by the defendant in the execution, and that no replevin shall lie for the recovery of any property taken by virtue of any warrant for the collection of any tax, assessment or fine, in pursuance of any statute of this State. 2 R. S. 523 (540), §§ 4, 5; 3 id. (5th ed.) 845, §§ 4, 5; Code, § 207. See *ante*, 717, § 3, c, § 4, c; *Hudler v. Golden*, 36 N. Y. (9 Tiff.) 446; S. C., 2 Trans. App. 316; *Stockwell v. Veitch*, 38 Barb. 650; S. C., 15 Abb. 412; *O'Reilly v. Good*, 42 Barb. 521; S. C., 18 Abb. 106; *ante*, 712.

d. Real property. Replevin will not lie for the recovery of any property other than personal. See art. 2, § 1, *a*, of this chapter.

e. Personal property. Replevin will not lie for the recovery of money, unless specifically described, and the plaintiff shows himself entitled to the possession of the specific money described. *Sager v. Blain*, 44 N. Y. (5 Hand) 445. Nor can a recovery be had, as for money had and received, when the action is in the form of replevin. *Ib*.

f. Before demand. Replevin will not lie against a party legally in possession of the property of another before demand and refusal. See *post*, 724, art. 3, § 1, *a*.

Section 6. Election of remedies.

a. In general. The proposition is too well established to need the citation of authorities in its support, that trespass *de bonis asportatis* and replevin in the *cepit*; or trover and replevin in the *detinet* are concurrent remedies. The remedies are distinct, although the facts that give the right of action in one case gives the right in the other. It is the demand for relief that determines the nature of the action. *Spalding v. Spalding*, 3 How. 297; S. C., 1 Code R. 64; *Dows v. Green*, 3 How. 377; *Seymour v. Van Curen*, 18 id. 94. But, although the plaintiff has his election between the remedies given, he cannot have both in the same action. He must elect between the remedies, and, having made his election, must abide by it. *Ib*. See *Morris v. Rexford*, 18 N. Y. (4 Smith) 552; *Bank of Beloit v. Beale*, 34 id. (7 Tiff.) 473; S. C., 7 Bosw. 611; 20 How. 331; 11 Abb. 375. Where the complaint sets up a cause of action in trover, and the relief demanded is damages for the conversion, the plaintiff cannot have

Local or transitory — Demand before action.

both the delivery of the property under section 206 of the Code and the relief demanded in the complaint. *Seymour v. Van Curen*, 18 How. 94; *Maxwell v. Farnam*, 7 id. 236; *Spalding v. Spalding*, 3 id. 297. Neither can the plaintiff in replevin have the defendant arrested and held to bail under section 179 of the Code, and also have the property delivered to him before judgment in the action. *Chappel v. Skinner*, 6 How. 338.

Where a vendor sells goods for cash on delivery, and fails to get payment according to contract, he may either consider the delivery absolute and rely on the responsibility of his vendee, or he may disaffirm the contract and replevy his property. But he cannot do both, "The law tolerates no such absurdity as the seizure of goods by a person claiming that he has never sold them, and an action by the same person, founded on the sale and delivery of the same goods, for the recovery of the price." *Morris v. Rexford*, 18 N. Y. (4 Smith) 552; *Bank of Beloit v. Beale*, 34 id. (7 Tiff.) 473; S. C., 7 Bosw. 611; 20 How. 331; 11 Abb. 375.

Section 7. Local or transitory.

a. In general. The Code, in section 123, provides that actions for the recovery of personal property distrained for any cause must be tried in the county in which the subject of the action or some part thereof is situated. Before the Code, replevin was declared a local action. *Williams v. Welch*, 5 Wend. 290; *Atkinson v. Holcomb*, 4 Cow. 45. But the action was so far transitory under the English statutes that the plaintiff might bring his action in any county where the defendant had had the goods since the taking. F. N. B. 69.

ARTICLE III.

PROCEEDINGS BEFORE TAKING PROPERTY.

Section 1. Demand before action.

a. In general. Before commencing an action for the recovery of the possession of personal property wrongfully detained, the plaintiff should make a formal demand for its delivery. Where the defendant came lawfully into the possession of the property claimed by the plaintiff, he can be guilty of no unlawful detention, except after due demand, and a refusal on his part, subsequent to the demand, to deliver up the property to the plaintiff.

At what time remedy may be had.

Sluyter v. Williams, 37 How. 109 ; S. C., 1 Sweeny, 215 ; *Ross v. Cassidy*, 27 How. 416 ; *White v. Dodds*, 28 id. 197 ; S. C., 42 Barb. 554 ; 18 Abb. 250. Against an original wrong-doer no demand is necessary. *Ib. Roth v. Palmer*, 27 Barb. 652. But where the defendant came into possession of the property by the delivery of the wrong-doer, and merely detains it or receives it from the original owner, with his consent, as under contract, or by license, the possession is lawful, and a demand is necessary before action. *Fuller v. Lewis*, 13 How. 219 ; S. C., 3 Abb. 383 ; *White v. Dodds*, 28 How. 197 ; S. C., 42 Barb. 554 ; 18 Abb. 250 ; *Tallman v. Turck*, 28 Barb. 167. If on demand the defendant offers unconditionally to restore the property, the object of the suit is already attained, and an action of replevin will not lie. *Savage v. Perkins*, 11 How. 117.

Section 2. At what time remedy may be had.

a. In general. The Code authorizes the plaintiff, in an action to recover the possession of personal property, to claim its immediate delivery, either at the time of the issuing of the summons, or at any time before answer. Code, § 206. The right to the remedy is given only where the requirements of the statute, in respect to the preliminaries to the action, have been fulfilled by the plaintiff. When this has been done, the right to the remedy is absolute. *Nosser v. Corwin*, 36 How. 540. The defendant, by serving an answer to the complaint, may defeat the plaintiff's right to demand the return of the specific chattels claimed before a final judgment in his favor, if the provisional remedy given by the Code has not been resorted to at the commencement of the action. The remedy can only be obtained before answer. Code, § 206. Where the plaintiff recovers in the action, the judgment in his favor will entitle him to the possession of the specific chattel and all the advantage he might have obtained under the remedy, even though no attempt has been made to enforce its delivery under the provisions of section 206 of the Code. The spirit of this section is not to compel the plaintiff to resort to the provisional remedy in every action to recover the possession of a specific chattel, but to fix a time and prescribe a manner in which the remedy must be had, if at all. *Vogel v. Badcock*, 1 Abb. 176 ; *Corbin v. Milton*, 27 How. 76.

Section 3. Action, how and when commenced.

a. In general. The action of replevin, or, as it is called under the Code, "the action for the recovery of the possession of per-

sonal property," must be commenced, like all other actions, by the service of a summons. Code, § 127. The Code provides in section 139 that from the time of the service of the summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction and to have control of all the subsequent proceedings. The latter clause of this section does not apply to the provisional remedy, called "claim and delivery," but has reference only to those remedies allowed by the court, and which cannot be obtained without the exercise of strictly judicial power. *Nosser v. Corwin*, 36 How. 540. The right to the remedy, and to the proceedings under it, is complete when the summons is issued and placed with the proper undertaking and affidavit in the hands of the sheriff for service. *Tracy v. New York and Harlem Railroad Company*, 9 Bosw. 396. But the action is not commenced thereby, but may be defeated by the delivery of the property to the plaintiff, and its acceptance by him at any time before the actual service of the summons. *Cristie v. Corbett*, 34 How. 19; *Nosser v. Corwin*, 36 id. 540. See, also, *Tracy v. New York and Harlem Railroad Company*, 9 Bosw. 396; *Savage v. Perkins*, 11 How. 17.

Section 4. Affidavit.

a. Requisites of affidavit. Where a delivery of the property is claimed before judgment, an affidavit must be made by the plaintiff, or some one in his behalf, showing: 1, that the plaintiff is the owner of the property claimed, or is lawfully entitled to its possession by virtue of a special property therein; 2, that the property is wrongfully detained by the defendant; 3, the alleged cause of the detention of the property, according to the affiant's best knowledge, information and belief; 4, that the same has not been taken for a tax, assessment or fine, pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff; or, if so seized, that it is by statute exempt from such seizure; 5, the actual value of the property. Code, § 207.

Where the plaintiff is the owner of the property claimed, and seeks to recover it on that ground, it will be sufficient to allege directly the fact of ownership, in connection with the other material allegations. *Burns v. Robbins*, 1 Code R. 62. See *Vandenburgh v. Van Valkenburgh*, 8 Barb. 217; S. C., 1 Code R. N. S. 169. But where the plaintiff is not the owner of the property claimed, but has a special property therein which entitles

Affidavit and notice in replevin.

him to the possession, the facts showing such special property should be set forth in the affidavit, that the court may decide upon the existence of such special property, and the right of the plaintiff to the possession of the property. *Depew v. Leal*, 2 Abb. 131.

The affidavit should also minutely describe the property claimed. Code, § 207. And the property should be described as it exists at the time of making the affidavit. As, where the logs of the plaintiff have been wrongfully taken and converted into boards, the plaintiff, in his affidavit, should describe the property as boards. He cannot describe it as mill logs and recover boards. *Wingate v. Smith*, 20 Me. 287.

The plaintiff may safely allege that the defendant wrongfully *detains* the property, although he may have knowledge at the time that the property is not in the defendant's possession. *Brockway v. Burnap*, 16 Barb. 309; *Nichols v. Michael*, 23 N. Y. (9 Smith) 264; *Ross v. Cassidy*, 27 How. 416.

Where the plaintiff seeks to recover property seized on execution, he must show, by a detailed statement of facts, that the property seized was exempt from execution. *Spalding v. Spalding*, 3 How. 297; S. C., 1 Code R. 64. The mere belief of the plaintiff will always be insufficient where the law has required proof of a fact by affidavit. *Roberts v. Willard*, 1 Code R. 100.

Affidavit and Notice in Replevin.

SUPREME COURT.

A. B., plaintiff, <i>aget.</i> C. D., defendant.	}
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COUNTY OF _____, ss:

A. B., of _____, being sworn, says:

I. That he is the plaintiff in the above-entitled action, and is the lawful owner, and is lawfully entitled to the possession of the following articles of personal property, namely: (*Describe the property minutely.*)

II. That the said property is wrongfully detained by C. D., the defendant above named.

III. That the alleged cause of the detention thereof, according to deponent's best knowledge, information and belief, is as follows: (*State the alleged cause.*)

IV. That the said property has not, nor has any part thereof, been taken for a tax, assessment or fine pursuant to statute, or seized under an execution or attachment against the property

Controverting affidavit—Requisition on affidavit.

of the said plaintiff (*Or, if so seized, omit the third allegation and continue except as hereinafter stated.*)

That the said C. D. claims to be the sheriff of _____ county, and as such sheriff to have levied upon the said property under an execution alleged to have been issued against the property of this plaintiff, which is the alleged cause of the detention of said property, according to deponent's best knowledge, information and belief.

That this plaintiff is a householder and resides in this State, and that the said property is a part of his necessary household furniture, the whole value of which was less in the aggregate than two hundred and fifty dollars, besides the articles specified in the Revised Statutes as exempt, and that the said property so seized by the said C. D. is exempt by law from levy and sale on execution as deponent is advised by his counsel and verily believes, (*or state any other fact showing that the property was exempt.*)

V. That the actual value of said property, according to this deponent's best judgment and belief, is _____ dollars.

(*Jurat.*)

(*Signature.*)

b. Controverting affidavit. Where property has been improperly taken in an action in the nature of replevin, the affidavit of the plaintiff may be controverted in an action to set aside the proceedings to obtain an immediate delivery. *O'Reilly v. Good*, 42 Barb. 521 ; S. C., 18 Abb. 106. In the absence of proof to the contrary, the court will assume the allegations of the plaintiff to be true. *Knehue v. Williams*, 1 Duer, 597 ; S. C., 11 N. Y. Leg. Obs. 187.

Section 5. Requisition on affidavit.

a. In general. Having made the necessary affidavit, the next step on the part of the plaintiff is to indorse upon it a requisition to the sheriff of the county where the property claimed may be, to take the same from the defendant and deliver it to the plaintiff. Code, § 208. The affidavit and requisition taken together are in the nature of process. *O'Reilly v. Good*, 42 Barb. 521 ; S. C., 18 Abb. 106.

Requisition to be indorsed on affidavit.

SUPREME COURT.

A. B., plaintiff,	}
agst.	
C. D., defendants.	

To the sheriff of the county of _____

You are hereby required to take the personal property, mentioned and described in the within affidavit, from the said defend

Security on part of plaintiff.

ant, C. D., and deliver the same to the said plaintiff in this action.

Dated . . . , 187 . . .

O. P.,
Attorney for plaintiff.

Section 6. Security on part of plaintiff.

a. Approval by sheriff. The plaintiff is required by the Code to furnish security in the form of a written undertaking, executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property as stated in the affidavit, for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may for any cause be recovered against the plaintiff. Code, § 209. This approval of the undertaking by the sheriff is a ministerial act, and one for his protection. But he cannot arbitrarily refuse to approve the sureties when given in conformity to statute. *Nosser v. Corwin*, 36 How. 540. The sheriff should indorse his approval on the undertaking. *Burns v. Robbins*, 1 Code R. 62: But before so doing it is his duty to require the sureties to justify, or, if the security offered is by way of mortgage on real estate, to require proof of the value of the mortgaged property. Rule 9, Supreme Court. In no case can the sheriff legally dispense with the undertaking, and all proceedings will be irregular where such security is not given. *Potter v. Lewis*, 18 Wend. 519; *Wilson v. Williams*, id. 581.

The number of sureties given is immaterial, if the amount justified to is equal in the aggregate to double the value of the property claimed, as stated in the affidavit of the plaintiff. Code, § 209; *Graham v. Wells*, 18 How. 376.

There is no provision in the Code entitling a party to have any security other than the undertaking approved by the sheriff, however inadequate the amount for which it is given, and the only remedy for the defendant where sham security is taken, is in an action against the sheriff. *De Regue v. Lewis*, 3 Rob. 708; *Manley v. Patterson*, 3 Code R. 89. This undertaking is conditioned for the payment to the defendant of such sum as may for any cause be recovered against the plaintiff in the action. Code, § 209.

This includes the costs at the special term, or on appeal to the general term, or to the court of appeals. *Tibbles v. O'Connor*,

Plaintiff's undertaking in replevin.

28 Barb. 538. So the undertaking is a substantial compliance with requirements of the Revised Statutes in relation to a bond for security for costs to be given by non-resident plaintiffs, and no further security need be given. *Wisconsin Marine & Fire Insurance Co. Bank v. Hobbs*, 22 How. 494. See *Boucher v. Pia*, 14 Abb. 1; S. C., 8 Bosw. 691.

Plaintiff's undertaking in replevin.

SUPREME COURT.

A. B., plaintiff,	}
agst.	
C. D., defendant.	

WHEREAS, the plaintiff alleges that the defendant has in possession, and wrongfully detains certain personal property belonging to the said plaintiff of the estimated value of dollars, and the said plaintiff being about to commence an action to recover the possession of said property; and whereas, the said plaintiff claims the immediate delivery of the said property to , by the sheriff of the county of , pursuant to statute.

Now, therefore, we, M. N., of the , of the county of , by occupation a , and O. K., of said and county, by occupation a , do hereby undertake and bind ourselves to the defendant in the sum of dollars, for the prosecution of the said action, and for the return to the said defendant of the said property, if a return thereof be adjudged, and for the payment to the said defendant of such sum as may, for any cause, be recovered in said action against said plaintiff.

Dated this day of , 18 .

(Signatures.)

STATE OF NEW YORK, } ss:
 county.

On this day of , in the year one thousand eight hundred and , before me, the subscriber, appeared M. N. and O. K., to me personally known to be the same persons described in, and who executed the above undertaking, and severally acknowledged that they executed the same.

(Signature of Officer.)

STATE OF NEW YORK, } ss:
 county.

M. N. and O. K., the sureties in the foregoing undertaking, being severally sworn, each for himself, says he is a householder of this State, and that he is worth in property not exempt from

Amendment of undertaking — Service of papers on defendant by sheriff.

execution, the sum of dollars, over and above all debts or responsibilities which he owes or has incurred.

M. N.,
O. K.

Subscribed and sworn before me, }
this day of , 18 . }
(Signature.)

I certify that I find the sureties in the foregoing undertaking sufficient, and do approve and allow the same.

R. S., *sheriff*.
By O. H., *his deputy*.

b. Amendment of undertaking. An undertaking once executed cannot be altered without the consent of the sureties. *Burns v. Robbins*, 1 Code R. 62. The undertaking may be amended, however, by the court, or a new undertaking given *nunc pro tunc*. Code, § 173; *Decker v. Judson*, 16 N. Y. (2 Smith) 439; *Cutler v. Rathbone*, 1 Hill, 204; *Newland v. Willetts*, 1 Barb. 20; *Hawley v. Bates*, 19 Wend. 632; *Whaling v. Shales*, 20 id. 673. The rules of the supreme court require that all bonds and undertakings, and other securities in writing, shall be duly proved or acknowledged in like manner as deeds of real estate, before the same shall be received or filed. Rule 9. But where this rule is not complied with, the defect may be cured on application to the court, and on such terms as the court may deem just. *Conklin v. Dutcher*, 5 How. 386; S. C., 1 Code R. N. S. 49; *M' Laren v. Charrier*, 5 Paige, 530; *Rida-bock v. Levy*, 8 id. 197; *Harrington v. American Life Insurance & Trust Co.*, 1 Barb. 244.

Section 7. Service of papers on defendant by sheriff.

a. In general. Immediately on executing the requisition by taking the property described in the affidavit, the sheriff should deliver to the defendant personally a copy of the affidavit, notice and undertaking; or if the defendant cannot be found, by delivering such papers to his agent from whom the property is taken. Where neither the defendant, nor any one in possession of the property can be found, the papers will be sufficiently served by leaving them with some person of suitable age and discretion, at the usual place of abode of either. Code, § 209. But service should never be made on the agent when it can be made on the principal.

Section 8. Exception to sureties by defendant.

a. In general. At any time within three days after the service of a copy of the affidavit and undertaking, the defendant may give notice to the sheriff that he excepts to the sufficiency of the sureties, and if he fails to give notice within this time he will be deemed to have waived all objection to them. Code, § 210. This time is given to the defendant to allow him to determine whether he will claim the re-delivery of the property during the action, or permit the plaintiff to retain it until the right to the possession is determined by the court. *Graham v. Wells*, 18 How. 376. If he elects to reclaim the property, no exception to the sureties of the plaintiff would be proper, as it would bar him of the right to its re-delivery. Code, § 210; *Graham v. Wells*, 18 How. 376.

Section 9. Justification of plaintiff's sureties.

a. Manner of justification. Where the defendant elects to permit the plaintiff to hold the property during the pendency of the action, and he excepts to the plaintiff's sureties, they must justify on notice, in the same manner as upon bail on an arrest. Code, § 210. See *ante*, 647, 648.

On the receipt of the notice that the defendant excepts to the sureties on the undertaking, the sheriff or plaintiff may at any time within ten days give notice to the defendant of the justification of the sureties, before a judge of the court or county judge, at a time not less than five nor more than ten days thereafter. Code, § 193. The qualifications of sureties and their justification must be such as are prescribed by sections 194 and 195 in respect to bail upon an order of arrest. Code, § 213. See Justification of Bail, *ante*, 647, 648, 687.

Where the sureties fail to justify at the time specified in the notice, further time may be allowed for good cause shown. But a new notice of justification must in that case be given. *Burns v. Robbins*, 1 Code R. 62. For the purposes of bail, a surety who rents and occupies within the State a portion of a building for business purposes is to be deemed a householder. *Somerset, etc., Savings Bank v. Huyck*, 33 How. 323.

b. Action on undertaking. Where judgment is rendered in favor of the defendant in an action of replevin, and where an execution against the property has been returned unsatisfied, the defendant may bring an action on the undertaking to recover the value of the property replevied, and his damages and costs.

The liability of the sureties in the undertaking becomes fixed

Sheriff's liability until justification.

on the recovery of judgment, and there is no other condition to be complied with by the plaintiff, as a pre-requisite to the right to sue them on it. No leave of the court is necessary. *Livingston v. Hammer*, 7 Bosw. 670; *New York Central Insurance Company v. Safford*, 10 How. 344.

Where the judgment rendered against the plaintiff is appealed from, the sureties will be liable in the action on the undertaking for the costs of the appeal, as well as in the original action. *Tibbles v. O'Connor*, 28 Barb. 538. No assignment of the undertaking to the defendant is necessary where the promise is to the defendant personally. *Decker v. Anderson*, 39 Barb. 346. And where the promise contained in the undertaking is made to the sheriff, the defendant is entitled to an assignment of the undertaking, on request, even though he may have excepted to the sureties and they have failed to justify. *Ib.* Where, as is usually the case, the undertaking has not, in terms, any obligee or promisee, it may be regarded as having been given to either. *Ib.* In this case, mere manual delivery to the party in interest will constitute a sufficient assignment. *Ib.* Where the undertaking is in form a joint obligation, it will be presumed that it was intended that the liability should be several as well as joint, and effect will be given to it according to that intention. An action can be brought upon it against either of the parties to the instrument. *Morange v. Mudge*, 6 Abb. 243.

Section 10. Sheriff's liability until justification.

a. In general. The sheriff is responsible for the sufficiency of the sureties until the objection to them is either waived by a failure to except on the part of the defendant, or until they shall justify, or new sureties shall be substituted and justify. Code, § 210.

Section 11. Setting aside proceedings.

a. In general. Whenever property has been improperly taken out of the hands of the party in possession, in an action of replevin the remedy of such party is to move to set aside the proceedings had to obtain an immediate delivery of the property taken. *O'Reilly v. Good*, 42 Barb. 521; S. C., 18 Abb. 106. This motion will be granted where a third party, claiming the right to the possession of replevied property, mistakes his remedy and improperly obtains possession of it in an action in the nature of replevin. *Edgerton v. Ross*, 6 Abb. 189. So the motion will be granted where the plaintiff has first obtained an order of arrest and held

the defendant to bail, and afterward obtained possession of the property under the provisional remedy given in section 206 of the Code. Having a right to no remedy but that first chosen, the affidavit, requisition and undertaking must be set aside on motion, and the property restored to the defendant. *Chappel v. Skinner*, 6 How. 338. The motion will be proper where the affidavit upon which the plaintiff obtained the delivery of the goods is defective. *Depew v. Leal*, 2 Abb. 131; *Wisconsin Marine and Fire Insurance Co. Bank v. Hobbs*, 22 How. 498. So where the plaintiff proceeds as in an action of replevin, but demands relief inconsistent with such action, this motion will be proper. *Spalding v. Spalding*, 3 How. 297; S. C., 1 Code R. 64; *Dows v. Green*, 3 How. 377; *Seymour v. Van Curen*, 18 id. 94.

The party seeking this relief by motion should put in only a limited or special appearance, as a general notice of appearance will be deemed a waiver of irregularities. *Hyde v. Patterson*, 1 Abb. 248. So where the defendant gives a counter security, and obtains a redelivery, he will waive his right to set aside the plaintiff's proceedings. *Nicoll v. Pinner*, 10 How. 376; *Wisconsin Marine and Fire Ins. Co. Bank v. Hobbs*, 22 id. 494.

Notice of Motion to set aside Plaintiff's Proceedings.

SUPREME COURT.

A. B., plaintiff,	}
agst.	
C. D., defendant.	

Sir: Take notice, that upon the affidavit, a copy of which is herewith served upon you, and upon the complaint and all the proceedings in this action, the undersigned will move this court at the next special term thereof, to be held at the _____ in the _____ of _____, on the _____ day of _____, 18____, at the opening of the court, or as soon thereafter as counsel can be heard, that the affidavit made by the plaintiff in this action, and the requisition to the sheriff in the county of _____, indorsed thereon, and all proceedings taken by the plaintiff or by the said sheriff, respectively, by virtue thereof, may be set aside as void (and irregular for that, etc., *specifying the irregularity*), and that the property taken by the sheriff, under said affidavit and requisition, may be restored by him to the said defendant (and for the costs of this motion), or for such further order or relief as the court may grant in the premises.

Dated _____, 18____.

Yours, etc.,

E. F.,

To G. H.,

Attorney for plaintiff.

Attorney for defendant.

Redelivery of property to defendant.

Section 12. Redelivery of property to defendant.

a. In general. Under the former practice no provisions were made for the return to the defendant of the property taken in replevin, except where judgment had been rendered in his favor in the progress of the action. Section 211 of the Code gives to the defendant three days in which to determine whether he will allow the plaintiff to hold the property taken, or will cause it to be restored to his own possession. If he elects to reclaim the property, he must, within these three days, require the officer who served the replevin papers to return the property to him, at the same time delivering to the officer the undertaking required in section 211 of the Code. *M' Cann v. Thompson*, 13 How. 380; *Graham v. Wells*, 18 id. 376. The effect of this demand is, not to entitle the defendant to an immediate return of the property, but to prevent its delivery to the plaintiff. To perfect the defendant's right to a redelivery of the property taken, he must proceed to have his sureties justify as provided in section 212 of the Code. *Graham v. Wells*, 18 How. 376. When the sureties have so justified, the sheriff must deliver the property to the defendant. Code, § 212; *Grant v. Booth*, 21 How. 354.

Notice by defendant to Sheriff to return Property.

(Title of cause.)

To _____, sheriff of _____ :

You are hereby required to return to the defendant the personal property taken and held by you in this action.

(Date.)

(Signature.)

Section 13. Undertaking given by the defendant.

a. In general. In order to obtain the return of the property taken by the sheriff, the defendant must deliver to the sheriff a written undertaking executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant. Code, § 211. When more than two sureties join in executing the undertaking the entire sum in which they must justify must be in the aggregate equivalent to that of two sufficient bail. Thus, if the value of the property as stated in the plaintiff's affidavit is \$20,000, each of the

Undertaking by defendant in replevin.

sureties executing the undertaking, if there are but two of them, must make oath that he is worth the sum of \$40,000, over and above all debts and liabilities; or, if there are more than two sureties to the undertaking, they must justify in the aggregate amount of \$80,000. *Grant v. Booth*, 21 How. 354; *Graham v. Wells*, 18 id. 376.

The promise contained in the undertaking may be made to the plaintiff or to the sheriff, or it may be made generally, specifying no particular obligee. *Slack v. Heath*, 4 E. D. Smith, 95; *Decker v. Judson*, 16 N. Y. (2 Smith) 439.

Undertaking by Defendant in Replevin.

SUPREME COURT.

A. B., plaintiff,
agst.
C. D., defendant.

Undertaking on the part of the defendant to prevent the delivery of personal property.

WHEREAS, The plaintiff in this action has claimed the delivery to him of certain personal property specified in the affidavit made on behalf of the plaintiff for that purpose, of the alleged value of dollars, and has caused the same to be taken by the sheriff of the county of , pursuant to the second chapter of the seventh title of the second part of the Code of Procedure, but the same has not yet been delivered to the plaintiff.

AND WHEREAS, the defendant is desirous of having the said personal property returned to him: Now, therefore, we, M. N., of , by occupation a , and O. K., of , by occupation a , do hereby undertake and become bound to the plaintiff in the sum of dollars, for the delivery of the said property to the plaintiff, if such delivery shall be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant in this action.

Dated , 18 .

M. N.
O. K.

STATE OF NEW YORK, }
County of }

On this day of , A. D. 18 , before me, the subscriber, appeared M. N. and O. K., to me personally known to be the same persons described in and who executed the above undertaking, and severally acknowledged that they executed the same. (Signature.)

STATE OF NEW YORK, }
County of }

M. N. and O. K., being severally sworn, each for himself says, the said M. N. says he is a householder of the county of , in this State, and that he is worth in property not exempt from execution the sum of dollars, over and above all debts

Justification of defendant's sureties.

and responsibilities which he owes or has incurred; and the said O. K. for himself says, that he is a freeholder of the county of _____, in this State, and that he is worth in property not exempt from execution the sum of _____ dollars, over and above all debts and responsibilities which he owes or has incurred.

Sworn to before me, this _____ day } M. N.
of _____, 18 . } O. K.
(Signature.)

Sheriff's approval of Sureties.

I certify that I approve of the sureties in the foregoing undertaking.
O. P., *Sheriff.*
By G. H., *his Deputy.*

Section 14. Justification of defendant's sureties.

a. In general. The defendant's sureties, upon a notice to the plaintiff, of not less than two nor more than six days, must justify before a judge in the same manner as upon bail on arrest. Code, § 212.

But there is no prescribed time within which the sureties must give this notice or appear and justify. The plaintiff has ample security for the property independently of such justification. *Graham v. Wells*, 18 How. 376.

Notice of Justification to be Annexed to a Copy of the Undertaking.

(Title of cause.)

Take notice, that the sureties in the annexed undertaking will justify before the Hon. _____, a justice of the _____, at chambers, in the _____, at the _____ of _____, on the _____ day of _____, 18 _____, at _____ o'clock in the forenoon.

Yours, etc.,
(Date.) R. S.,
To O. P., *Plaintiff's Attorney.* *Defendant's Attorney.*

Section 15. Sheriff's liability until justification.

a. To defendants. The sheriff's liability to the defendant commences with the taking of the property described in the affidavit of the plaintiff. It is continued until the expiration of the three days within which the defendant must except to the plaintiff's sureties, if at all. If no objection is raised within that time, the sheriff's liability to the defendant is at an end. But, if within that time the defendant excepts to the plaintiff's sureties, the

sheriff's liability will continue until the sureties have justified or new ones have been substituted and justified.

b. To plaintiff. But if, before the three days have expired, the defendant, on a proper undertaking, requires the return of the property, the sheriff's liability to the plaintiff commences and continues until the defendant's sureties have justified. Should these sureties fail to justify, the sheriff will be liable until he has delivered up the property to the party prevailing in the action. Code, §§ 210, 212; *Graham v. Wells*, 18 How. 376. Whenever the sheriff is liable to either party to the action, he is entitled to retain, in his own possession, the property taken. *Ib.*

Where the defendant has been arrested in the action, and has given the undertaking with sureties, as prescribed in section 211, and thereupon has been discharged from arrest, the sheriff will become liable in the same manner and to the same extent as the original bail, if the sureties fail to justify; and if the plaintiff recovers in the action, the sheriff may be compelled to satisfy the judgment, either by producing and delivering the specific property, or by paying such sum as may, from any cause, be recovered against the defendant. *McKenzie v. Smith*, 27 How. 20.

c. Liability to third parties. The liability of a sheriff to a third party whose goods he has taken upon a replevin process, is based upon principles and measured by rules totally different from those which determine his liability in taking the goods of a stranger upon an execution or an attachment. If an execution is issued against the property of A., and the sheriff takes the property of B. thereon, he will be liable to an action at the suit of B. The same rule applies, where, upon an attachment against the property of A., the property of B. has been taken. *Rogers v. Weir*, 34 N. Y. (7 Tiff.) 463. But if in an action of replevin the sheriff is required by his process to take from the possession of A. certain specified chattels which are in fact the property of B., no action will lie against him for the trespass. *Hallett v. Byrt*, Carthew, 380; *Foster v. Pettibone*, 20 Barb. 350; *King v. Orser*, 4 Duer, 431; *Shipman v. Clark*, 4 Denio, 446; *State v. Jennings*, 14 Ohio St. 73; *Willard v. Kimble*, 92 Mass. (10 Allen) 211. The reason for this distinction is to be found in the requirements of the process under which the sheriff acts in the several cases mentioned. The command inserted in an execution is general and merely directs the taking of the property

Sheriff's liability to third parties.

of the defendant, leaving the officer free to determine what property is the defendant's, and what he may safely seize under his process. The law allows him also to protect himself from the claims of third persons, by demanding indemnity from the plaintiff.

The process in replevin, however, does not command the sheriff to take the property of the defendant, but to take the specific chattels described in the plaintiff's affidavit. Neither can the sheriff, as in case of an execution, demand indemnity. On the other hand, he is liable to an indictment, and also to a civil action if he refuse to execute the process. To this double liability, the law does not add a liability to a third party whose property shall have been taken in pursuance of a valid process requiring the taking of that identical property. It is a familiar principle, that the law will not hold an officer liable for doing what that law expressly commands him to do, but will hold him protected by his process so far as he acts within its directions. *Ib.*

Prior to the Code, it was held that an officer executing a replevin process was protected thereby in taking the property described therein from the possession of a stranger to the action. *Shipman v. Clark*, 4 Denio, 446. This protection was not, however, extended to the party who sued out the writ. *Ib.* But under the Code, the rule is changed; and an officer is not protected by a replevin process in taking the goods of a stranger from the possession of any person other than the defendant or his agent. *King v. Orser*, 4 Duer, 431; *State v. Jennings*, 14 Ohio St. 73. See *Willard v. Kimball*, 92 Mass. (10 Allen) 211, 213. This change in the law regulating the liability of the sheriff in executing replevin process is due to the change in the requirements of the process itself. Under the old practice, the writ of replevin, not indeed by express words, but by necessary implication, authorized the sheriff to take the goods described therein, whenever they might be found within his county. 2 R. S. 523 (540), § 6. Under the Code, the sheriff is authorized to take the property described in the affidavit of the plaintiff, when it is found in the possession of the defendant or his agent. Code, § 209. If the property is in the possession of any person other than the defendant, the sheriff, in taking it, acts at his peril, and can free himself from liability as a trespasser only by showing that this person was in reality no more than an agent of the

defendant, and in this capacity alone held the possession. *King v. Orser*, 4 Duer, 431.

d. As a bailee. In the preceding portions of this section the liability of the sheriff has been considered in reference to the taking of property in an action of replevin, and the damages resulting therefrom. These damages arise from the wrongful act of the officer. But the property in the hands of the sheriff may be totally destroyed and lost to the owner without the knowledge or agency of the officer, as by fire, water, or theft. The law requires the sheriff to take the goods from the defendant in an action of replevin, and retain them in his possession until the right to the possession has been determined by the courts, or until one of the parties to the action becomes entitled to their custody, in accordance with the provisions of the statutes. While the sheriff so retains the property he acts as a bailee of the goods for the benefit of the parties interested, and is liable only when guilty of more than ordinary neglect. It is only when there is such an absence of that care which a man of ordinary intelligence would take of his own property, that the sheriff can be made liable to the owner. *Moore v. Westervelt*, 27 N. Y. (13 Smith) 234; S. C., 21 id. (7 id.) 103; 9 Bosw. 558; 25 How. 277. In no case is the sheriff the insurer of the property replevied. *Ib.*

Section 16. Qualifications of sureties.

a. In general. The sureties to an undertaking in an action of replevin must possess the same qualifications as are prescribed in section 194 of the Code, in respect to bail upon an order of arrest. Code, § 213. See *ante*, 646.

ARTICLE IV.

PROCEEDINGS ON TAKING PROPERTY.

Section 1. Mode of taking property.

a. In general. Upon the receipt of the affidavit, notice and undertaking, it becomes the duty of the sheriff to forthwith take the property described in the plaintiff's affidavit, if it can be found in the possession of the defendant or his agent, but not otherwise. Code, § 209; *King v. Orser*, 4 Duer, 431.

If the property to be replevied, or any part thereof, is concealed in a building or inclosure, the sheriff should first publicly demand its delivery, and, on a failure to comply therewith,

Second order — Proceedings after taking the property.

should proceed to take the property into his possession by breaking open the building or inclosure. If necessary, he may call to his aid the power of the county. Code, § 214.

Section 2. Second order.

a. In general. Where the sheriff has succeeded in obtaining only a part of the goods described in the affidavit, the plaintiff may proceed in his suit, or, on a return that the residue cannot be found, he may deliver to the sheriff a second requisition to take the remainder of the goods. But, where a second or third order issues, there should be no unnecessary delay in its delivery to the sheriff, or in its execution. *Snow v. Roy*, 25 Wend. 602.

ARTICLE V.

PROCEEDINGS AFTER TAKING THE PROPERTY.

Section 1. Property, how kept.

a. In general. When the sheriff has taken the property into his possession, he is required to keep it in a secure place, and deliver it to the party entitled to its possession on the receipt of his lawful fees and the necessary expenses of keeping it. Code, § 215. The manner of keeping the property taken is dependent upon the nature of the goods, and the security given to the officer. Until sureties have been given and justified, or until all exceptions to them have been waived, the sheriff is entitled to retain possession of the goods. *Graham v. Wells*, 18 How. 376. During this time the sheriff is a simple bailee, and it is his duty to take such steps to secure the safety of the property in his charge as any prudent man of good sense might reasonably be expected to take if the property were his own. *Moore v. Westervelt*, 27 N. Y. (13 Smith) 234; S. C., 21 id. (7 id.) 103; 9 Bosw. 558; 25 How. 277.

While the property is in his hands the sheriff may remove it to any safe place; or, where the removal would be attended with great expense compared with the value of the goods, he may, in the absence of objection from either party, leave them where found, and in the charge of a deputy. While holding the goods in his possession he has such a property in them as will justify him in covering them with a reasonable insurance. *White v. Madison*, 26 How. 481; S. C., 26 N. Y. (12 Smith) 117.

Where the defendants in an action of replevin are common

Claim of property by third persons.

carriers, and the only right to the possession of the goods claimed by them is that the goods were left with them for transportation, and where other claimants, representing distinct interests, have been interpleaded the sheriff may, with the consent of the parties, permit the goods to be carried to their original destination, and the proceeds brought back and deposited in court. The money so deposited will be a valid protection to the sheriff for the sale of the goods. *Schuyler v. Hargous*, 28 How. 245; S. C., 3 Rob. 673.

Section 2. Claim of property by third persons.

a. Claim, how made. The only way in which a third party can assert his claim to goods taken by the sheriff, in an action of replevin, is by making an affidavit of his title thereto, and of his right to the possession, stating the grounds of such right and title, and serving the same on the sheriff. Code, § 216; *Edger ton v. Ross*, 6 Abb. 189.

But this course need be pursued only when the property claimed has been taken by the sheriff in the proper discharge of his duty. Where the property taken was not that described in the affidavit of the plaintiff, or where the property was taken from the possession of a person other than the defendant or his agent, the true owner may resort to an action of trespass, trover, or replevin to maintain his rights. He is not limited to the procedure indicated in section 216. *King v. Orser*, 4 Duer, 431.

Affidavit of Claim by third person.

(Title of cause.)

(Venue.)

R. S., of in said county, being duly sworn, says, that he is the (sole) owner of certain personal property taken by the sheriff of the said county of in this action, which property is described as follows: (*describe the property*). That this deponent purchased the said property of the defendant, on the day of , 187 , paying therefor the sum of dollars. That deponent has not sold or disposed of the said property or any part thereof.

(Jurat.) •

(Signature.)

Notice to the Sheriff of Claim by third person.

To , Sheriff of the county of :

SIR: Please take notice that I claim the personal property mentioned in the annexed affidavit, and that you are required to deliver the same to me.

(Date.)

(Signature.)

Proceedings by the sheriff on claim of property.

b. Proceedings by the sheriff. Where a third party has served the proper affidavit of title, the sheriff is not bound to keep the property, or to deliver it to the plaintiff, unless fully indemnified against the claim of such third party, by a proper undertaking. Code, § 216. In the absence of any statutory provisions in regard to the disposal of the property, where such claim has been made and no indemnity given, the sheriff should simply cease to act. The provisions of section 216 of the Code were intended simply for the protection of the sheriff, in case he should deliver property seized in an action of claim and delivery to a plaintiff therein, and not to sanction its delivery to a defendant.

A failure by the plaintiff to give the proper indemnity, upon a claim by a third party, does not authorize the sheriff to deliver the replevied property to such third party. He can only permit the original defendants, from whose possession the property was taken, to *resume it*, by relinquishing it himself. The former practice justified an officer in delivering property to a plaintiff in an action of replevin, after a sheriff's jury had found the right to the property to be in the plaintiff. The 216th section of the Code dispenses with the necessity of any such trial. *Haskins v. Kelley*, 1 Rob. 160; S. C., 1 Abb. N. S. 63. Before relinquishing the property seized, however, the sheriff should demand indemnity, and allow the plaintiff a reasonable time to prepare the undertaking and obtain sureties qualified to make the requisite affidavit. Code, § 216.

Sheriff's Notice of Third Person's Claims.

(Title of cause.)

SIR: *Please take notice* that R. S. claims the property taken by me in this action, and that, unless the plaintiff indemnifies me against such claims, I shall not keep the property or deliver it to the plaintiff.

Yours, etc.,

(Date.)

To E. F.,

J. K.,

Sheriff of

Plaintiff's Attorney.

c. Undertaking by plaintiff. If the plaintiff still desires to obtain the possession of the property, notwithstanding the claim of the third party thereto, he should proceed at once to indemnify the sheriff, by an undertaking executed by two sufficient sureties, accompanied by their affidavits, that they are *each*

worth double the value of the property as specified in the affidavit of the plaintiff, and that they are freeholders and householders of the county. Code, § 216. On delivering this undertaking to the sheriff, the plaintiff is entitled to the possession of the replevied property as against the claim of the third party.

Plaintiff's Undertaking to Indemnify Sheriff.

(Title of cause).

WHEREAS, The above-named plaintiff claims the possession of the following personal property now in the possession of the sheriff of the county of _____, and taken by him in this action; and whereas, one R. S. claims to own and have the right of possession of said property:

Now, therefore, We, M. N. of _____, by occupation a _____, and O. K. of _____, by occupation a _____, undertake to indemnify the said sheriff against the claims of said R. S., if the said property be delivered to the plaintiff.

M. N.
O. K.

Signed and delivered }
in the presence of }
(Witness.)

(Date.)

Affidavit of Sufficiency.

(Venue).

M. N. and O. K., being duly sworn, severally say, each for himself, that he is worth (*double the value specified in the plaintiff's affidavit*), over all his debts and liabilities, and exclusive of property exempt from execution; and that he is a householder and freeholder in the county of _____.

M. N.
O. K.

(Jurat).

Acknowledgment.

STATE OF NEW YORK, }
County, } ss:

On this _____ day of _____, in the year one thousand eight hundred and seventy _____, before me, the subscriber, appeared M. N. and O. K., to me personally known to be the same persons described in and who executed the above undertaking, and severally acknowledged that they executed the same.

(Signature of Officer.)

Section 3. Delivery of property to plaintiff.

a. In general. It is the duty of the sheriff to retain the property taken until the expiration of the three days al-

lowed the defendant to except to the plaintiff's sureties. no exception is made within that time, the sheriff should deliver the property to the plaintiff, unless a third party has by affidavit, interposed a claim as shown in the preceding section. In such case, the delivery should be made to the plaintiff only on the receipt of a proper undertaking. Code, §§ 21: 216 ; *Graham v. Wells*, 18 How. 376 ; *McCann v. Thompson*, 1 id. 380. But the statute does not require the sheriff to deliver the property to either party before he has received his law fees for taking, and his necessary expenses for keeping the same Code, § 215. The fact that the plaintiff's sureties failed to justify will not deprive the plaintiff of his right to the possession of the goods, on the expiration of the time allowed the defendant for exception to such sureties. *Manley v. Patterson*, 3 Code R. 89

Section 4. Return of proceedings, filing of notices and affidavits, and delivery of undertakings.

a. In general. Within twenty days from the taking of the property in a replevin action, the sheriff must file the notice affidavit and his return thereon, with the clerk of the court in which the action is pending. Code, § 217. If this return is not made within this time, it may be enforced as in other cases. Rule 10, Supreme Court. The sheriff should state in his return the names, occupations and places of residence of the persons who were sureties in the undertaking, taken by him from the plaintiff. He should set forth at length all his proceedings under the affidavit and notice. If the goods and chattels specified in the affidavit have not been replevied, he should state the cause why they have not ; and if the defendant has been arrested and discharged on bail, the sheriff should return the names of the sureties on the undertaking as well as their occupations and places of residence. The undertaking given in these proceedings should be delivered by him to the parties for whose benefit they were taken. Code, § 423.

Section 5. Amendments.

a. In general. On a motion to set aside the proceedings in an action of replevin, on account of a defect in the affidavit, the court may allow additional affidavits to be read in support of the original one, or it may allow an amendment of the affidavit on terms. *Depew v. Leal*, 2 Abb. 131 ; *Vanderheyden v. Mallary*, 3 How. 295. But a general appearance by the defendant in the action will waive all defects in the affidavit. So, where he gives

an undertaking and obtains a redelivery of the property to himself, he will be deemed to have waived all defects in the prior proceedings. *Hyde v. Patterson*, 1 Abb. 248; *Roberts v. Willard*, 1 Code R. 100; *Wisconsin Marine and Fire Insurance Co. Bank v. Hobbs*, 22 How. 494. The pleadings in the action cannot be amended where the amendments would substantially change the form of the action. *Nosser v. Corwin*, 36 How. 540.

Section 6. Sheriff's fees and expenses.

a. In general. The claim of the sheriff for seizing and holding goods by virtue of replevin process must be limited to the specific fees provided for the service of such process and the necessary expenses for keeping the same. Code, § 215. See as to fees, Laws of 1871, ch. 415; 2 R. S. 664 (645), § 38; 3 R. S. (5th ed.) 924, § 33; as to expenses, *White v. Madison*, 26 N. Y. (12 Smith) 117; S. C., 26 How. 481.

Section 7. Discontinuance.

a. In general. After issue joined in a replevin action, the action cannot be discontinued by the plaintiff on the mere payment of costs, without returning the property taken. The remedy of the defendant, in cases where the plaintiff seeks to discontinue, and still profit by the provisional remedy, is to notice the cause for trial, where, if he recover, he will obtain a judgment for a return and the costs of the action. *Wilson v. Wheeler*, 6 How. 49; S. C., 1 Code R. N. S. 402; *Schroeder v. Kohlenback*, 6 Abb. 66.

Section 8. Abatement of action.

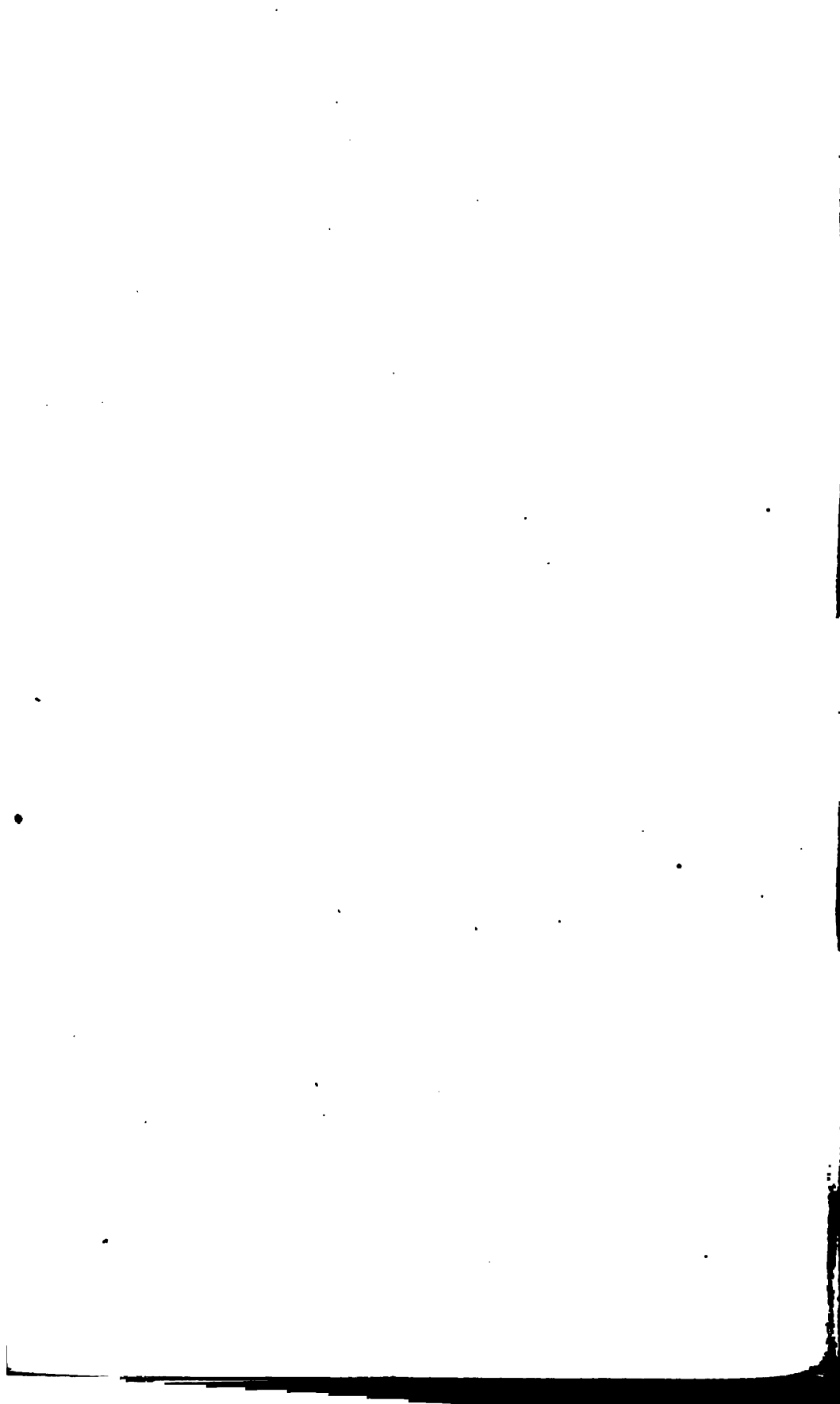
a. In general. An action for the recovery of the possession of specific personal property, against a sole defendant, wholly abates, where the defendant dies before verdict or judgment, and the court has no power in such case to order the action to be continued against the personal representatives of the defendant. *Mosely v. Mosely*, 11 Abb. 105; *Hopkins v. Adams*, 5 id. 351; S. C., 6 Duer, 685; *Lahey v. Brady*, 1 Daly, 443; *Potter v. Van Vranken*, 36 N. Y. (9 Tiff.) 619, 627; S. C., 2 Trans. App. 73. But in no case will it abate by the death of the plaintiff, after action brought, if the cause of action be such that it might have been prosecuted by the executor or administrator of the party. Goods taken and continuing in specie in the hands of a wrongdoer may be recovered back by the personal representatives of the owner. *Ib.*

Arrest of defendant.

Section 9. Arrest of defendant.

a. In general. The Code provides that the defendant may be arrested in an action to recover the possession of personal property unjustly detained, where the property or any part thereof has been concealed, removed or disposed of, so that it cannot be found or taken by the sheriff, and with the intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof. Code, § 179, subd. 3.

But an order of arrest cannot be granted where the defendant has in good faith so disposed of the property before the commencement of the action that it is out of his power to deliver it. *Sherlock v. Sherlock*, 7 Abb. N. S. 22; *Merrick v. Suydam*, 1 Code R. N. S. 212; *Remin v. Nagle*, id. 219. In all cases the wrongful *intent* must clearly appear. *Watson v. McGuire*, 33 How. 87; S. C., 2 Daly, 219. See *ante*, pp. , Arrest; Election of Remedies.



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